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No. 96-859

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

STEVEDORING SERVICES OF AMERICA
and
EAGLE PACIFIC INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. Department of Labor, and CHARLES SPROULL,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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116 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals misapply § 10(c) of the Longshore and Harbor Workers' Compensation Act (the LHWCA), 33 USC §§ 901-950, when it determined that vacation pay respondent Sproull received after his injury should be included in his average weekly wage for the purpose of calculating his compensation benefits?

2. Did the Court of Appeals misapply § 8(h) of the LHWCA when it affirmed the application of an "inflation factor" to respondent Sproull's post-injury earnings, despite unchallenged findings of fact that his earnings fairly and reasonably represented his wage-earning capacity?

3. Did the Court of Appeals err in deferring to respondent Director's litigating position when it applied § 14(f) of the LHWCA, a penalty provision, to petitioners' untimely payment of interest, on the ground that interest is "inherently" part of "compensation," although it is not included in the statutory definition, § 2(12)?

PARTIES TO THE PROCEEDING

The case caption contains the names of all the parties to the proceeding in the Court of Appeals.

Petitioner Stevedoring Services of America is a corporation. It has no parent companies or domestic nonwholly owned subsidiaries.

Petitioner Eagle Pacific Insurance Company, Stevedoring Services of America's workers' compensation insurance carrier, is a corporation. Its parent corporation is Eagle Insurance Group. It has no nonwholly owned subsidiaries.

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The opinion of the United States Court of Appeals for the Ninth Circuit was reported officially at 86 F3d 895 (9th Cir. 1996) and unofficially at 30 Ben. Rev. Bd. Serv. (MB) 49 (CRT) (9th Cir. 1996). (Appendix, A-1 - A-12)

The *en banc* decision and order of the Benefits Review Board on reconsideration was reported unofficially at 28 Ben. Rev. Bd. Serv. (MB) 271 (1994). (Appendix, B-1 - B-22)

The panel decision and order of the Benefits Review Board was reported unofficially at 25 Ben. Rev. Bd. Serv. (MB) 100 (1991). (Appendix, C-1 - C-27)

The administrative law judge's decision and order awarding benefits was not reported. (Appendix, D-1 - D-13)

The district director's compensation order denying assessment of a 20 percent penalty under § 14(f) of the LHWCA was not reported. (Appendix, E-1 - E-3)

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1996. The Court entered its order denying petitioners' timely petition for rehearing on August 30, 1996. (Appendix, F-1 - F-2)

Petitioners believe the Court has jurisdiction under 28 USC § 1254(1).

STATUTES INVOLVED IN THIS CASE

Four subsections of the LHWCA are involved in this case. Petitioners set out the text of § 2(12), § 8(h), § 10(c), and § 14(f) of the LHWCA, 33 USC § 902(12), § 908(h), § 910(c), and § 914(f) respectively, at Appendix, G-1 - G-2.

STATEMENT OF THE CASE

A. *The Injury*

Claimant Charles Sproull (Sproull) injured his left shoulder on January 10, 1985, while he was employed by petitioner Stevedoring Services of America as a longshoreman aboard a ship berthed on navigable waters. He underwent rotator cuff repair surgery on April 17, 1985. He was off work until September 16, 1985. Petitioners compensated him

for temporary total disability for the period January 11 - September 15, 1985. They terminated compensation when he returned to work. (Appendix, D-2, D-9, D-12 - D-13)

B. *Vacation Pay*

During the first week of April 1995, Sproull received a check for "vacation pay" from Pacific Maritime Association (PMA), the Pacific Coast longshore employers' payroll and collective bargaining agent. Vacation pay is paid under the following provisions of the collective bargaining agreement between Sproull's union and PMA:

> § 7.1 . . . In any payroll year, each longshoreman who is registered and qualified on December 31 of the calendar year in which he earns his vacation shall receive a vacation with pay the following year at the straight-time hourly rate to which the employee was entitled . . . on January 1 of the calendar year in which vacations are paid. . . .
>
> § 7.42 The Pacific Maritime Association shall be the disbursing agent under this Agreement and shall make vacation checks available in the same manner as regular paychecks are made available in each port area. Vacation checks will be available for distribution in the first week of April of the calendar

year in which the vacations are paid.

Sproull's vacation pay in April 1985 was $2,892.60. In April 1984, it was $2,658.60. Those were gross amounts. In both years, Sproull received a net check, less withholdings. His 1985 payment was larger than his 1984 payment because the straight time hourly wage rate had increased, in July 1984. (Appendix, C-8 - C-9, D-3)

C. *Return to Work*

When Sproull returned to work, he determined that his shoulder condition required him to take lighter jobs on the dock. He no longer worked on the night shift, because more dock jobs were available on the day shift. His hours and his earnings increased every year after he returned to work in September 1985, even though the pay scale for the day shift was lower and he could no longer take "extra" jobs on that shift while regularly working nights.

Sproull's seniority permitted him to continue to take dock jobs for as long as he wished to continue working as a longshoreman. Enough dock jobs were available for his future work opportunity to be very stable. He received no medical treatment for his shoulder after September 10, 1985, shortly before he returned to work. (Appendix, D-2, D-5 - D-7)

D. *Average Weekly Wage*

Sproull claimed compensation for permanent partial disability. *See* 33 USC § 908(c)(21) and § 908(h). He argued that petitioners had miscalculated his average weekly wage under § 10(c) of the LHWCA, 33 USC § 910(c), because they should have included the vacation pay he received in April 1985, after his injury, and excluded the vacation pay he received in April 1984, less than 52 weeks before it.

The administrative law judge agreed, reasoning that Sproull had "earned" his 1985 vacation pay in 1984, *i.e.*, before his injury, so inclusion of the post-injury payment more accurately reflected Sproull's "wage-earning capacity" under 33 USC § 910(c). The effect of the adjustment was to increase Sproull's average weekly wage by $5.21. (Appendix, D-3 - D-4)

The Benefits Review Board reversed. The panel that initially reviewed the claim based its decision on the collective bargaining agreement, *see* pages 3-4, above, and held:

> . . . [I]n this case the vacation pay should be accounted for in the year it is received, because claimant only 'qualified' in 1984 to receive a vacation in 1985, and therefore, his wages in 1984 should not include the vacation paid in 1985 at 1985 rates.[3]

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[3] This holding also allows employers to readily calculate claimants' earnings at the time of injury in order to institute voluntary compensation payments and would eliminate delaying necessary information for up to one year, as the vacation pay is paid at the next year's pay rate in the April following the year it was earned.

(Appendix, C-10 - C-11)

On *en banc* rehearing, the Board was evenly divided, so the panel's decision stood as the Board's decision.[1] (Appendix, B-17 - B-18)

The Court of Appeals disagreed with the premise of the Board's decision and reversed. The Court determined that Sproull "*earned* the April 1985 vacation wages before his injury, from January 1 to December 31, 1984." (Emphasis in original)

The Court dismissed the Board's concern for the administrative inconvenience that would result to employers

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[1] *See* Regulations Governing the Benefits Review Board, 20 CFR § 801.301(c).

who voluntarily pay compensation if post-injury earnings must be included in the average weekly wage calculation: the administrative law judge "was able accurately and properly to calculate Sproull's average weekly wages." Finally, without citing case authorities, the Court rejected petitioners' contention that Sproull's April 1985 vacation pay ". . . constitutes post-injury earnings which are typically excluded from an employee's average weekly wage." The Court concluded that the administrative law judge's calculation of Sproull's average weekly wage reasonably represented his "annual earning capacity" under 33 USC § 910(c). (Appendix, A-6 - A-8)

E. *Permanent Partial Disability*

Sproull contended that under 33 USC § 908(h), his post-injury earnings had to adjusted downward for "inflation" before it could be determined whether he had lost wage-earning capacity. The administrative law judge agreed. He found that Sproull's hourly wage scale after his injury was about 15 percent greater than it had been before the injury, and he adjusted Sproull's post-injury earnings downward accordingly. He determined that the adjusted earnings constituted Sproull's wage-earning capacity. Because those earnings were less than Sproull's average weekly wage, the administrative law judge awarded Sproull permanent partial disability compensation equal to two-thirds of the difference

under § 8(c)(21) of the LHWCA, 33 USC § 908(c)(21). (Appendix, D-7 - D-8)

The Benefits Review Board and the Court of Appeals affirmed.

The Board concluded that the administrative law judge had found that Sproull's post-injury wages were representative of his wage-earning capacity, but that the inflation adjustment was proper in any event, particularly because the Board had reduced Sproull's average weekly calculation. (Appendix, C-17 - C-18)

The Court of Appeals recognized that under 33 USC § 908(h), an employee's wage-earning capacity is determined by his or her actual post-injury earnings if they "fairly and reasonably represent his wage-earning capacity." However, under 33 USC § 908(h), if those earnings do not fairly represent wage-earning capacity, the trier of fact "may, in the interest of justice, fix such wage-earning capacity as shall be reasonable," with regard to an open-ended list of factors, including the nature of the employee's injury, the degree of impairment, and his or her "usual employment."[2] The Court held that the administrative law judge did not err in considering the 15 percent increase in Sproull's wage scale as

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[2] *See* Appendix, G-1.

the dispositive factor in determining his post-injury wage-earning capacity.

The Court cited *LaFaille v. Benefits Review Bd.*, 884 F2d 54, 61 (2d Cir. 1989), for the proposition that actual post-injury earnings do not fairly represent wage-earning capacity *unless* they have been converted to their pre-injury equivalent. (Appendix, A-5 - A-6)

F. *Twenty Percent Penalty*

The administrative law judge awarded Sproull interest on the additional past-due compensation awarded by his compensation order. Petitioners paid all compensation awarded within ten days of the filing of the order, but the interest was not paid until approximately three months later. (Appendix, D-8 - D-9, D-13, E-2).

Under § 14(f) of the LHWCA, 33 USC § 914(f), if compensation payable under an award is not paid within ten days after it becomes "due,"[3] an amount equal to 20 percent of the unpaid compensation must be paid in addition to the

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[3] Compensation orders are "effective" when filed in the office of the district director, formerly the deputy commissioner. *See* 33 USC § 921(a). Compensation is "due" when the order awarding it is "effective." *See Arrow Stevedore Co. v. Pillsbury*, 88 F2d 446, 447 (9th Cir. 1937).

compensation.[4]

Sproull asked the district director, respondent Director's regional administrator, to assess a 20 percent penalty on the amount petitioners paid as interest. Petitioners objected, on the ground that the statutory definition of "compensation," 33 USC § 902(12)[5], does not include interest. The district director refused to assess a penalty. She determined that interest due on compensation under an award is not itself "compensation" that is subject to a 20 percent penalty under 33 USC § 914(f) for late payment. (Appendix, E-2 - E-3)

Sproull appealed. The Benefits Review Board reversed the district director's order, over a dissent. The Court of Appeals affirmed the Board's order on petitioners' appeal. The Director appeared before both the Board and the Court to argue in support of assessment of a 20 percent penalty. (Appendix, A-11 - A-12, C-5 - C-6, C-22 - C-24)

The Court of Appeals rejected petitioners' reliance on 33 USC § 902(12), the definition of "compensation." The Court

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[4] *See* Appendix, G-2. The 20 percent payment is a penalty. *See Strachan Shipping Co. v. Wedemeyer*, 452 F2d 1225, 1228 (5th Cir. 1971), cert. denied, 406 US 958 (1972); *Twine v. Locke*, 68 F2d 712, 714 (2d Cir. 1934).

[5] *See* Appendix, G-1.

deferred to the Director's "reasonable interpretation that interest is an inherent component of compensation," because interest "ensures that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled," and affirmed the Board's imposition of the penalty. (A-11 - A-12)

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in three respects. Its errors are interrelated. Each error results from the Court's practice of deferring to respondent Director's litigating positions, even when his positions are unsupported by past practice or by any regulations adopted under his rulemaking powers. Four other federal judicial Circuits refuse to defer to respondent Director's litigating positions in LHWCA review proceedings. Those Circuits, unlike the Ninth Circuit, are mindful of the Court's repeated warnings that the views of federal administrators are entitled to little, if any, deference when they are presented as respondent Director presented them below.

1. The Court of Appeals' construction of 33 USC § 910(c) undermines the uniform, nationwide application of the LHWCA, conflicts with decisions of the District of Columbia Circuit and the Seventh Circuit, and departs from the settled construction of 33 USC § 910(c)

A. *Uniform Interpretation of the LHWCA*

Congress enacted the LHWCA in 1927[6] to create a uniform federal workers' compensation law for maritime employees in a field where the states could not legislate constitutionally. *See Crowell v. Benson,* 285 US 22, 39-42 (1932); *see also Washington v. Dawson & Co.,* 264 US 219, 227-28 (1924); *Knickerbocker Ice Co. v. Stewart,* 253 US 149, 163-64 (1920).

The Court of Appeals undermines that uniformity by reading the collective bargaining agreement between respondent Sproull's union and PMA in a manner that will require a *post hoc* earnings adjustment in virtually every LHWCA claim filed by longshore employees who work under that agreement.[7] The bargaining agreement applies only in California, Oregon, and Washington, and only to longshore employees, not to shipyard workers, to marine construction workers, or to any other workers who may come within the coverage of the LHWCA.

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[6] *See* Act of March 4, 1927, c. 509, 44 Stat. 1424.

[7] The Court of Appeals' reading of the bargaining agreement was hardly required by its text. *See* pages 3-4, above. As the dissenting appeals judges noted on *en banc* review before the Board, Sproull qualified for a *vacation* in 1985 at the end of 1984, but he was not entitled to his vacation *pay* until April 1985, the time when the bargaining agreement requires payment. (Appendix, B-19 - B-20; *see also* Appendix, C-10 - C-11)

B. *Conflict with Decisions from Other Circuits*

Under 33 USC § 910, the "default" rule for calculating an employee's average weekly wage is based on ". . . the average weekly wage of the injured employee *at the time of the injury* . . ." Thus, inclusion of post-injury wages in the calculation of a claimant's average weekly wage is exceptional. *See Walker v. Washington Metro. Area Transit Authority*, 793 F2d 319, 321-22 (D C Cir. 1986), *cert. denied*, 479 US 1094 (1987).

The cases recognize two fact patterns in which an employee's post-injury earnings are used under 33 USC § 910(c) to calculate his or her average weekly wage. In the first, the employee's work was slow before the injury, but it increased greatly following it (or would have but for the injury). *See Tri-State Terminals v. Jesse*, 596 F2d 752, 753-54 (7th Cir. 1979). In the second, the employee's capacity to work increased dramatically during the latter part of the 52 weeks preceding the injury. *See Walker v. Washington Metro. Area Transit Authority, supra*, 793 F2d, at 322.

Sproull's claim fits neither fact pattern. The Court of Appeals did not even attempt to reconcile its holding with *Tri-State* or *Walker*, neither of which it cited. (Appendix, A-7 - A-8)

The District of Columbia Circuit might have been addressing Sproull's claim when it held as follows, in *Walker*:

> The fact that § 910(c) is invoked, however, does not afford *carte blanche* as to the factors that are relevant in carrying out the § 910(c) inquiry. Here, § 910(c) was used only because there were no employees of the 'same class' who had worked substantially the entire year, and because Walker's recent completion of the training program warranted examination of her post-training wages. Unlike cases involving exceptional circumstances relating to the intermittent nature of the work or the employee's capacity to work, Walker's case presented no cause for looking at factors other than her actual hourly rate prior to the injury. There was certainly nothing exceptional about the nature of her job that required examination of the post-injury trend in bus drivers' salaries. Walker's employment was a steady 40 hour work week, with the opportunity for some overtime. There is no evidence in the record that the rise in the salary of the bus driving job was attributed to any factors beyond inflation and typical raises based on seniority. To recognize these two factors as exceptional circumstances warranting consideration of the post-injury pay scale of the pre-injury job, would be to ignore the clear mandate of § 910,

which provides that the salary for the period prior to the injury is the relevant figure, absent some extraordinary circumstance. 793 F2d, at 322-23. (Footnote omitted)

C. *Settled Construction of 33 USC § 910(c)*

By its terms, 33 USC § 910(c) applies when 33 USC § 910(a) and (b) "cannot reasonably and fairly be applied." (Appendix, G-2) Section 910(c) is used when either 33 USC § 910(a) or (b) would overcompensate the employee in light of his or her actual work record. *See Duncanson-Harrelson Co. v. Director, OWCP,* 686 F2d 1336, 1342 (9th Cir. 1982), *vacated and remanded on other grounds,* 462 US 1101 (1983), *decision on remand,* 713 F2d 462 (1983). Thus, as the *Walker* court recognized, 33 USC § 910(c) itself should not be applied in a way that overcompensates the employee.[8]

The judicial Circuits, including the Ninth Circuit, have long interpreted the phrase "wage-earning capacity" in 33 USC § 910(c) as referring to the employee's "ability,

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[8] Petitioners recognize that the Court of Appeals' substitution of Sproull's 1985 vacation pay for his 1984 vacation pay does not significantly increase his benefits. The cost and the "administrative headache" of retrospectively adjusting benefit rates even on the accepted claims that will arise every year from the 9,000-member Pacific Coast longshore work force are of much greater moment. *See* Appendix, B-20.

willingness, and opportunity to work." *See Tri-State Terminals v. Jesse, supra,* 596 F2d, at 757; *Fireman's Fund Ins. Co. v. Van Steene,* 120 F2d 548, 549 (9th Cir. 1941).

Sproull's "ability, willingness, and opportunity to work" on January 1, 1995, the first date he was eligible to take his 1985 vacation[9], would not have been any different if he had not qualified in 1984 for a paid vacation in 1985. The Court of Appeals erred by ignoring the statute.

2. The Court of Appeals disregarded the plain language and the intended purpose of 33 USC § 908(h)

A. *The Findings*

The Board left intact the administrative law judge's findings that Sproull's post-injury dock work opportunities were very stable due to his age and seniority.[10] Based on those findings, the Board correctly concluded that the administrative law judge had found implicitly that Sproull's post-injury earnings were "representative of his post-injury wage-earning capacity." (Appendix, C-17) *See Long v.*

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[9] *See* pages 3-4, above.

[10] *See* Appendix, D-6 - D-7.

Director, OWCP, 767 F2d 1578, 1582 (9th Cir. 1985) ("[I]f the post-injury work is continuous and stable, the post-injury earnings are more likely to reasonably and fairly represent a claimant's wage-earning capacity"); *Todd Shipyards Corp. v. Allan,* 666 F2d 399, 402 (9th Cir.) ("The administrative law judge must determine that actual wages do not fairly represent wage-earning capacity before inquiring into other § 8(h) matters"), *cert. denied,* 459 US 1034 (1982).

The Court of Appeals did not mention the administrative law judge's finding or discuss its legal effect. (Appendix, A-5 - A-6) However, the finding is "conclusive if supported by substantial evidence in the record considered as a whole." *See* 33 USC § 921(b)(3).

B. *The Statutory Text*

The Court of Appeals, like the Board, erred by failing to apply 33 USC § 908(h) as written. Congress has mandated that in cases where 33 USC § 908(c)(21) applies[11], post-injury wage-earning capacity " . . . *shall be determined by actual earnings* if such actual earnings fairly and reasonably represent . . . wage-earning capacity . . ." (Emphasis added) This is

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[11] Sproull's injury was to his shoulder, which is not a scheduled body part. *See* section § 8(c)(1) through (c)(20) of the LHWCA, 33 USC § 908(c)(1) through (c)(20).

such a case.

The words "actual wages" do not mean "adjusted wages." The words cannot be read as if they did. The administrative law judge's finding precludes the adjustment that the Board and the Court of Appeals approved.

The Court of Appeals erred by following *LaFaille v. Benefits Review Bd.*, 884 F2d 54, 61 (2d Cir. 1989), in which the Second Circuit perpetuated the Board's earlier error by approving *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 Ben. Rev. Bd. Serv. (MB) 691 (1980). There, the Board remanded a compensation order for an "inflation" adjustment despite the fact that it affirmed a finding that the employee's actual post-injury wages were representative of his wage-earning capacity. *Id.*, at 695.[12]

Petitioners recognize that an employee's actual post-injury wages may not always fairly and reasonably represent his or her wage-earning capacity. That is particularly true during times of rapid inflation, when the passage of time may distort the calculation of lost wage-earning capacity. *See Bethard,*

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[12] *White v. Bath Iron Works Corp.*, 812 F2d 33, 35 (1st Cir. 1987), which the Court of Appeals also cited, is not inconsistent with petitioners' position. There was no finding in *White* that the claimant's earnings in his post-injury job, in which he lacked experience, were not representative of his wage-earning capacity, although the First Circuit suggested they were representative.

supra. However, there is no finding that inflationary trends devalued Sproull's post-injury wages.[13] In cases like this one, when there is a finding that the employee's post-injury wages are representative of wage-earning capacity, Congress has spoken clearly: wage-earning capacity *must* be based on actual earnings.

C. *Legislative History*

Congress enacted 33 USC § 908(h) in 1938.[14] The House Committee on the Judiciary reported that the purpose of the amending legislation was to clarify the meaning of the words "wage-earning capacity" and to provide for compensation in cases of "impairment of physical condition and probable impairment of future wage-earning capacity," even when there is no apparent wage loss, as when the employer "might be willing to continue [the employee] on in employment at the

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[13] Sproull's wages during the 52-week period preceding his injury, as determined by the Board -- *i.e.*, including the 1984 vacation pay and excluding the 1985 vacation pay -- were $37,935.35. Because Sproull's wages reflected seven weeks of time loss due to an earlier injury, for which he received LHWCA compensation, the Board in effect determined that his annual wages during the year preceding his injury were $43,836.40 -- 52/45 x $37,935.35. (Appendix, C-11 - C-12) If Sproull suffered any loss of earnings after he returned to work, it was in 1986, when he earned $36,072.64. However, in 1987 and 1988 he earned $44,732.40 and $49,550.03, respectively. (Appendix, D-6) The facts do not demonstrate a *permanent* loss of wage-earning capacity.

[14] *See* Act of June 25, 1938, c. 685, § 5, 52 Stat. 1165.

rate of pay at time of injury notwithstanding his impaired condition, particularly when the job does not require able-bodied labor. . . ." H. R. Rep. No. 1945, 75th Cong., 3d Sess., at 5-6 (1938).

Sproull moved into "very stable" lighter employment in the longshore industry after his injury. His seniority, rather than a beneficent employer, protected his ability to remain in that employment for as long as he wished. He did not see his physician for treatment after he returned to work in September 1985, although he worked more hours in 1986, 1987, and 1988 than he had before his injury. Congress did not intend 33 USC § 908(h) to apply to cases like Sproull's.

3. The Court of Appeals erred in deferring to the Director's litigating position, contrary to the holdings of four other judicial Circuits, and in adopting an insupportable construction of the LHWCA

A. *The Split Among the Circuits*

The federal judicial Circuits are "badly fractured in respect to the degree of deference that ought properly to be afforded to the Director's interpretation of the LHWCA." *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F2d

750, 757 (1st Cir. 1992).

The First Circuit does not defer to the Director's views when they concern interpretation of the case law rather than the LHWCA, *Id.*, nor when the Director "takes his position as a litigating party, not in support of his rule-making capacity." *Director, OWCP v. General Dynamics Corp.*, 980 F2d 74, 79 (1st Cir. 1992).

Similarly, the Fourth Circuit recently held in *Sidwell v. Express Container Services*, 71 F3d 1134 (4th Cir. 1995), *cert. denied*, --- US ---, 116 S Ct 2570 (1996), that it would not defer to the Director's views as expressed in an internal "program memorandum" and the Director's brief on appeal. In the absence of any indication that the Director had exercised the lawmaking powers delegated by Congress[15], the Court refused to defer to an interpretation that was advanced only in the context of the pending litigation. *Id.*, at 1141-42, citing *Bowen v. Georgetown University Hosp.*, 488 US 204, 213 (1988).

Even more recently, the Fifth Circuit held in *Total Marine Services v. Director, OWCP*, 87 F3d 774 (5th Cir. 1996), that it would not defer to an "administrative construction":

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[15] *See* 33 USC § 939(a)(1).

> The Director, Office of Workers' Compensation Programs, argues that its 'administrative construction' of section 904(a) of the LHWCA is entitled to judicial deference. We do not agree. The Supreme Court has recently reaffirmed, 'Of course we deny deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." The deliberateness of such positions, if not indeed their authoritativeness, is suspect.' *Smiley v. Citibank (South Dakota), N.A.*, 517 US ---, ---, 116 S Ct 1730, 1732-33, [135 L Ed 2d 25] (1996) (quoting *Bowen v. Georgetown University Hosp.*, [*supra*]). The Director has given us no indication that its construction of the statute is anything other than a litigating position 'unsupported by regulations, rulings, or administrative practice.' 87 F3d, at 776-77 n. 2.

The Eleventh Circuit agrees. That Circuit held in *Alabama Dry Dock & Shipbuilding Corp. v. Sowell,* 933 F2d 1561, 1563 (11th Cir. 1991), that it would defer to the Director's "official expressions of policy," but not to the Director's "litigating position."

In contrast, the Second Circuit held in *Director, OWCP v. General Dynamics Corp.*, 982 F2d 790 (2d Cir. 1992), that *Martin v. OSHRC,* 499 US 144, 156-57 (1991), required it to

reject earlier holdings that the Director's litigating position was not entitled to deference, because under *Martin*, the Court had to defer to "the office that has the policy-making authority" -- *i.e.*, the Director rather than the Board -- and because the Director's reasonable ". . . interpretation of regulations in an administrative action [is] itself viewed as agency action and [is] deemed as much an exercise of lawmaking powers as the promulgation of regulations." 982 F2d, at 794-95.[16]

In this case, the Ninth Circuit said that it would adhere to its practice of deferring to the Director's interpretations of the LHWCA. However, the Court of Appeals in fact deferred to the Director's reading of one of its own decisions, *Foundation Constructors, Inc. v. Director,* OWCP, 950 F2d 621, 625 (9th Cir. 1991), which held that imposing interest on past-due payments of LHWCA compensation serves the purpose of the statute, although such awards of interest are a judicial creation. The Court took an additional step in this case when it concluded that interest is "inherent" in the definition of "compensation," and that the imposition of a twenty percent penalty under 33 USC § 914(f) was therefore appropriate. (Appendix, A-4, A-11 - A-12)

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[16] Two other judicial Circuits have declined to defer to the Director's constructions of the LHWCA without referring to *Martin*. *See Sea-Land Service, Inc. v. Rock,* 953 F2d 56, 59 (3d Cir. 1992); *Director, OWCP v. Detroit Harbor Terminals,* 850 F2d 283, 287088 (6th Cir. 1988).

Respondent Director's argument was a litigating position pure and simple. The Court of Appeals did not cite any pertinent regulations issued pursuant to the Secretary of Labor's delegated rulemaking powers, because there are none. The Court could not even invoke consistent prior administrative practice: in this case the district director *denied* Sproull's request for a twenty percent penalty, stating the position that petitioners unsuccessfully argued below.[17] (Appendix, E-2 - E-3)

The Ninth Circuit now avowedly defers to the Director's litigating positions. In *Mallott & Peterson v. Director, OWCP*, 98 F3d 1170, 1996 WL 608607 (9th Cir. October 24, 1996), the Court so held, reasoning that "administrative adjudications are agency action, not *post hoc* rationalizations for it." 1996 WL 608607, at *1, *citing Martin, supra*, 499 US, at 156-57.

B. *Martin Misread*

The Ninth Circuit has gone beyond even the Second Circuit in reading *Martin* expansively. At the pages of *Martin* that the Ninth Circuit cited, 499 US, at 156-57, the Court emphasized the role of administrative adjudications in

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[17] *See, generally, I.N.S. v. Cardoza-Fonseca*, 480 US 421, 446 n. 30 (1987).

developing the interpretation of agency *regulations*, particularly in the setting before the Court, where the Secretary of Labor commenced an enforcement proceeding by citation. *Id.* The Court emphasized "the narrowness of [its] holding." *Id.*

Sproull's claim is typical of LHWCA proceedings. The Director did not issue a citation or seek to apply his interpretation of a regulation to the facts of the claim. Rather, Sproull himself made claim for permanent partial disability compensation after petitioners terminated their voluntary payments upon his return to work. The dispute between petitioners and Sproull concerns "private rights," *i.e.*, "the liability of one individual to another under the law as defined," *Crowell v. Benson, supra,* 285 US, at 51, *approved in Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 US 50, 69-70 (1982); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 US ---, 115 S Ct 1278, 1286, 131 L Ed 2d 160 (1995) (*Newport News*).

The Director has no responsibility for adjudicating the dispute between petitioners and Sproull, and he has issued no regulations bearing on it. His claim to deference in this case is particularly attenuated. *Cf. Newport News, supra,* 115 S Ct, at 1287. The Ninth Circuit erred in accepting his claim. The views of the First, Fourth, Fifth, and Eleventh Circuits are better reasoned and should form the basis for a uniform

interpretation of the Director's role in the LHWCA claims litigation process.

C. *The Director Before the Court*

The Court has not addressed the circumstances under which federal courts must defer to the Director's interpretations of the LHWCA. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 US 469, 476-77 (1992), the Court concluded that it did not have to resolve "the difficult issues regarding deference," because the Director did not claim deference for his reading of the LHWCA, which contradicted the position he had taken below before the Fifth Circuit.[18]

The Court carefully considered the Director's responsibilities as administrator under the LHWCA in *Newport News, supra,* 115 S Ct, at 1285. Only one area of the Director's responsibility, enforcing compensation orders, has any bearing on the penalty issue. However, the district director declined to assess a penalty against petitioners *in this*

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[18] The Circuits are in disarray as to the meaning of *Estate of Cowart*. The First Circuit reads the Court's comments as questioning whether the Director should be accorded deference for a position raised for the first time in litigation. *See Director, OWCP v. General Dynamics Corp., supra,* 980 F2d, at 79. The Second Circuit reads the same comments as implicitly recognizing that the Director's position *would* be deferred to if it was reasonable and had not changed during the litigation. *See Director, OWCP v. General Dynamics Corp., supra,* 982 F2d, at 795.

case, and the Director's position on appeal is supported by nothing more than his own say-so.

D. *Improper Construction of the LHWCA*

Congress knew how to allow for interest in the LHWCA. *Former* 33 USC §914(m), enacted in 1956 and repealed in 1972[19], provided that "any amount accruing as interest upon defaulted compensation" that was collectible under 33 USC §918 did not apply against the then-applicable "cap" on compensation payable for an injury.

In 1927, when Congress enacted the LHWCA, it used the New York workers' compensation law as its model. *See Lawson v. Suwannee Fruit & Steamship Co.*, 336 US 198, 205 (1949). However, Congress chose not to adopt either of the interest provisions that were then part of the New York law.[20]

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[19] *See* Act of July 26, 1956, c. 735, § 5,, 70 Stat. 655; *and* Pub. L. 92-576, October 27, 1972, § 5(e), 86 Stat. 1254.

[20] Under § 20 of the New York law as amended in 1925, interest is payable on compensation awards. *See* N. Y. Laws 1925, c. 660, § 1. Section 20 is a rough equivalent to 33 USC § 919. Even earlier, § 24 of the New York law was amended to require payment of interest from the date the compensation commission "made" an award in cases where the appellate division affirmed it on appeal. N. Y. Laws 1917, c. 705, § 6. That interest provision was reenacted, still as part of § 24, in the wholesale revision of the statute in 1922. N. Y. Laws 1922, c. 615. Except for the interest provision,

Congress' omission of any provision for interest compels the conclusion that interest cannot be considered a component of "compensation," defined in 33 USC § 902(12) as "the money allowance payable . . . *as provided for in this chapter.*" (Emphasis added)

The Court of Appeals' contrary conclusion is a *non sequitur*. The Court assumes that because interest is awarded by the courts to make an employee whole when payment of compensation is delayed, the twenty percent penalty allowable under 33 USC § 914(f) must be available in order to make the employer pay quickly, and therefore interest is "compensation." (Appendix, A-11 - A-12)

However, Congress did enact a remedy, in § 21(d) of the LHWCA, 33 USC § 921(d), which authorizes enforcement of final compensation orders when the employer fails to comply. Thus, an employer's failure to pay an award of interest may be dealt with under 33 USC §921(d).

The Court of Appeals, urged on by the Director, has amended the LHWCA *de facto*, apparently in the belief that it has found a better remedy than the remedy Congress provided. That is improper.

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which is the last sentence of § 24 and does not appear in the LHWCA, § 24 is the model for 33 USC §926 and §928.

In *Newport News, supra,* 115 S Ct, at 1288, the Court cautioned that the proposition that the LHWCA should be construed liberally, to achieve its purposes:

> . . . may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively. . . .

The LHWCA is not simply a remedial statute, to be broadened as considerations of the moment may seem to require. It is a compromise, intended to strike a balance between the interests of maritime employers and employees. That balance should not lightly be disturbed. *See Morrison-Knudsen v. Director, OWCP,* 461 US 624, 636-37 (1983).

Probably no other judicial Circuit would have accepted the Director's interpretation of the term "compensation." Certainly the First, Fourth, Fifth, and Eleventh Circuits would not have done so. The Ninth Circuit's decision should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

APPENDIX A

CHARLES SPROULL, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; STEVEDORING SERVICES OF AMERICA; EAGLE PACIFIC INSURANCE COMPANY, Respondents.

No. 94-70906

STEVEDORING SERVICES OF AMERICA; EAGLE PACIFIC INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; CHARLES SPROULL, Respondents.

No. 94-70914

United States Court of Appeals, Ninth Circuit

Filed June 17, 1996

Before: Alfred T. Goodwin, Otto R. Skopil, Jr., and Mary Schroeder, Circuit Judges

OPINION

SKOPIL, Senior Circuit Judge:

Charles Sproull, a longshoreman, and his employer, Stevedoring Services of America (SSA), separately petition for review of a Benefits Review Board (Board) decision granting Sproull permanent partial disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-50 (LHWCA). SSA also petitions for review of the Board's decision denying its claim against the Director of the Office of Workers' Compensation Program (Director) for special fund relief under 33 U.S.C. § 908(f), and the Board's assessment of a twenty percent penalty for late payment of interest due Sproull. We grant Sproull's petition, and grant in part and deny in part SSA's petition.

I.

Sproull was injured on January 10, 1985 when he fell and tore the rotator cuff tendon in his left shoulder. He was off work and received temporary total disability benefits until September 16, 1985. When Sproull returned to work he was limited to dock work off the "old man's board" and could not work as he previously had at night or as a linesman, both of which offer a higher rate of pay. Consequently, Sproull claimed a loss of wage earning capacity and permanent partial

disability benefits under the LHWCA.

A hearing on Sproull's claim was held before an Administrative Law Judge (ALJ) on January 26, 1986. The ALJ found Sproull entitled to permanent partial disability benefits, reasoning that Sproull's post-injury wage-earning capacity was less than his pre-injury average weekly wages. In addition, the ALJ denied SSA's request to offset Sproull's benefits with vacation and holiday pay SSA paid Sproull while he was receiving temporary total disability benefits. The ALJ did, however, grant SSA special fund relief under 33 U.S.C. § 908(f).

The Board affirmed the ALJ's finding that Sproull is entitled to benefits and the ALJ's denial of an offset. It reduced, however, the award of benefits, reasoning that the ALJ erred in calculating Sproull's pre-injury average weekly wages. The Board also reversed the ALJ's finding that SSA is entitled to special fund relief because SSA failed to produce medical opinions establishing that Sproull's current disability is contributed to by his prior hand injury. Finally, the Board assessed a twenty percent penalty against SSA pursuant to 33 U.S.C. § 914(f) for its late payment of interest due Sproull under the ALJ's order.

SSA and Sproull each petition for review of the Board's decision. Sproull contends that the Board erred by modifying

the ALJ's calculation of his average weekly wages, thereby reducing his benefits. SSA contends that the Board erred by affirming the award of benefits and the denial of an offset. SSA also argues that the Board erred by reversing the ALJ's grant of special fund relief and by assessing the twenty percent penalty.

II.

We review the Board's decisions for errors of law and adherence to the substantial evidence standard. *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 421 (9th Cir. 1995). The Board must accept the ALJ's findings of fact unless they are contrary to law, irrational or unsupported by substantial evidence in the record considered as a whole. 33 U.S.C. §921(b)(3); *Brady-Hamilton*, 58 F.3d at 421. We give no special deference to the Board's interpretations of the LHWCA, but do defer to the Director's interpretations. *Port of Portland v. Director, Office of Workers' Compensation Programs*, 932 F.2d 836, 838 (9th Cir. 1991). Although we respect the Board's reasonable interpretations, the "distinction in the deference owed the Director and the Board is significant . . . where their positions conflict with respect to the issues raised on appeal." *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 889 (9th Cir. 1993) (internal quotation omitted).

A. *Award of Benefits*

Permanent partial disability benefits are intended to compensate an injured employee for loss of earning capacity, which is calculated by comparing the employee's post-injury "wage-earning capacity" with his pre-injury "average weekly wages." 33 U.S.C. § 908(c)(21). If the wage-earning capacity is less than the average weekly wages, the employee is entitled to disability benefits equal to two-thirds of the difference. *Id.*

We first address SSA's contention that Sproull is not entitled to disability benefits because his wage-earning capacity, as represented by his actual earnings, is greater than his average weekly wages. An employee's wage-earning capacity is determined by actual earnings only if these earnings "fairly and reasonably represent his wage-earning capacity." 33 U.S.C. § 908(h). Otherwise, the ALJ must determine an amount representing the employee's "reasonable" wage-earning capacity. *Id.* Here, the ALJ found that Sproull's actual wages are not a fair and reasonable measure of his post-injury earning capacity because wage rates increased approximately fifteen percent after Sproull was injured. The ALJ therefore reduced Sproull's post-injury actual earnings by fifteen percent and used this adjusted amount in determining benefits.

Substantial evidence exists in the record to support the ALJ's finding that Sproull's actual earnings are not a fair and reasonable measure of his wage-earning capacity. The ALJ reasonably concluded that these earnings do not accurately project Sproull's loss of earning capacity because of an increase in wage rates. *See Brady-Hamilton*, 58 F.3d. at 421. "A disabled worker's post-injury earnings can only 'fairly and reasonably represent his wage-earning capacity'. . . if they have been converted to their equivalent at the time of injury." *LaFaille v. Benefits Review Bd.*, 884 F.2d 54, 61 (2d Cir. 1989); *see also White v. Bath Iron Works Corp.*, 812 F.2d 33, 35 (1st Cir. 1987) (ALJ may take into account wage increases when calculating wage-earning capacity). We therefore conclude that the Board did not err by affirming the ALJ's calculation of Sproull's wage-earning capacity.

We next address Sproull's contention that the Board erred by modifying the ALJ's calculation of his average weekly wages. Under 33 U.S.C. § 910(c), which the parties agree governs the calculation of Sproull's average weekly wages, the ALJ is directed to determine an amount which "reasonably represent[s] the annual earning capacity of the injured employee." This amount is then divided by fifty two, resulting in the employee"s average weekly wages.

In this case, the ALJ included in the calculation of Sproull's average weekly wages the vacation pay Sproull

earned in 1984, the calendar year prior to his injury, even though under the terms of the applicable collective bargaining agreement, Sproull did not receive this pay until April 1985, after the date of his injury. The April 1985 vacation pay was based on wage rates effective July 1, 1984. According to the ALJ, including Sproull's most recently earned vacation pay best reflects his future earning capacity had he not suffered the injury.

The Board reversed, concluding that the ALJ's reliance on vacation pay received after the date of the injury creates needless administrative problems. The Board reasoned that by including vacation pay received in 1984, even though earned in 1983, the parties and the ALJ would have been able to calculate more quickly the average weekly wages and resolve the disability claim. Although administrative convenience may possibly be relevant in some circumstances, here there were never any issues of inconvenience, confusion or delay in payment as hypothesized by the Board. Rather the ALJ was able accurately and properly to calculate Sproull's average weekly wages. After carefully reviewing the record, we conclude that the ALJ's calculation of Sproull's average weekly wages reasonably represents his annual earning capacity. *See* 33 U.S.C. § 910(c). The Board therefore erred by reversing the ALJ's determination.

There is no merit to SSA's contention that the vacation

pay Sproull received in April 1985 constitutes post-injury earnings which are typically excluded from an employee's average weekly wage. Sproull *earned* the April 1985 vacation wages before his injury, from January 1 to December 31, 1984. Nothing in the LHWCA prevents the ALJ from including in the average weekly wage wages earned before, yet received after, the employee's injury.

Finally, we reject SSA's contention that its liability to Sproull for disability benefits should be offset by the vacation and holiday pay which it paid Sproull while he was receiving temporary total disability benefits. According to SSA, Sproull was overcompensated during this time because he did not lose any wages for those days on which he received holiday and vacation pay. This argument, however, is flatly rejected by the terms of the collective bargaining agreement. Under that agreement, Sproull would have received both wages and holiday pay if he could have worked on the holidays. In addition, vacation pay is not based on an employee actually taking a vacation.

B. *Special Fund Relief*

The LHWCA, 33 U.S.C. § 908(f), provides that where an employee is permanently disabled and the disability is found not to be caused solely by the injury incurred on the job, the employer's liability is limited to a maximum of 104 weeks,

after which time liability is borne by the special fund established by 33 U.S.C. § 944. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1352 (9th Cir. 1993). To establish entitlement to special fund relief, the employer must demonstrate:

> (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the current disability is not due solely to the most recent inquiry [sic].

Id. (internal quotations omitted).

SSA requested special fund relief under section 908(f) based on medical evidence that Sproull had earlier suffered a hand injury. The only issue on appeal is whether SSA established the third requirement, namely that Sproull's prior injury contributes to his current disability.

The ALJ found that Sproull's prior injury does contribute to his current shoulder injury, reasoning as follows:

> Taking into consideration [Sproull's] testimony that in performing his work on the dock he has learned to use mostly his right arm and hand in handling slings,

> as well as the self-evident inter-relationship between the use of the hand, grip-strength and shoulder in his post-injury dock work, . . . and the recency of his 1983 left hand injury immediately prior to returning to work before the 1985 left shoulder injury, I find that [Sproull] had a pre-existing permanent partial disability within the meaning of the Act prior to his 1985 shoulder injury, and that his permanent partial disability resulting after the 1985 injury is materially and substantially greater than would have resulted from the latter injury alone.

The Board reversed, reasoning that "there are no medical opinions of record stating that [Sproull's] current disability is contributed to by his prior hand injury." Nothing in the LHWCA, however, requires employers to submit "medical opinions" to establish the contribution requirement, and we decline to create such a requirement. Rather, we conclude that SSA was entitled to establish the contribution requirement by medical or other evidence. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 8 F.3d 175, 185 (4th Cir. 1993), *affirmed*, 115 S. Ct. 1278 (1995); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1306 (2d Cir. 1992). The Board therefore erred by reversing the ALJ's grant of special fund relief.

C. *Twenty Percent Penalty*

Finally, SSA appeals the Board's assessment of a twenty percent penalty for its late payment of interest due Sproull under the terms of the ALJ's compensation order. SSA paid the interest more than ten days after the order was filed. Under 33 U.S.C. § 914(f), "[i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof."

"Compensation" is defined in the LHWCA as "the money allowance payable to an employee or to his dependents as provided for in this chapter." 33 U.S.C. § 902(12). SSA argues that interest is not "compensation" because it is not expressly provided for in the LHWCA. The Director counters that interest is a necessary and inherent component of "compensation" because it ensures that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled.

We recognized the necessity of imposing interest on the delayed payment of compensation benefits in *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991). In so doing, we deferred to the Director's interpretation that interest on past-due compensation serves the purposes of the LHWCA by fully compensating injured

workers. *See also Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 910-11 (3d Cir. 1994) (following *Foundation* and imposing interest on delayed payment of compensation). In addition, we reasoned that "[a]llowing an employer to delay compensation payments interest-free would reduce the worth of such payments to the claimant, undermining the remedial intent of the Act." *Foundation*, 950 F.2d at 625. This reasoning is equally applicable here. We therefore defer to the Director's reasonable interpretation that interest is an inherent component of compensation and affirm the Board's imposition of a twenty percent penalty on SSA's late payment of interest.

III.

The Board did not err by affirming the ALJ's calculation of Sproull's wage-earning capacity and the ALJ's denial of an offset to SSA, and by imposing a twenty percent penalty for SSA's late payment of interest. The Board did err by reversing the ALJ's calculation of Sproull's average weekly wage and the ALJ's grant of special fund relief to SSA.

PETITION GRANTED in No. 94-70906; PETITION GRANTED in part and DENIED in part in No. 94-70914. All sides to bear their own costs on appeal.

APPENDIX B

APPENDIX B

CHARLES SPROULL, Claimant-Respondent,
Cross-Petitioner, Petitioner,
v.
STEVEDORING SERVICES OF AMERICA and
EAGLE PACIFIC INSURANCE COMPANY,
Employer/Carrier-Petitioners,
Cross-Respondents, Respondents, and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR, Respondent,
Cross-Petitioner.

BRB Nos. 89-1209, 89-1209A,
89-1209B and 90-804

U. S. Department of Labor
Benefits Review Board

Issued October 25, 1994

Before: Dolder, Acting Chief Administrative Appeals Judge,
Smith, Brown and McGranery, Administrative Appeals Judges

DECISION and ORDER on
RECONSIDERATION EN BANC

DOLDER, Acting Chief Administrative Appeals Judge:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), have filed timely Motions for Reconsideration of the Board's Decision and Order in the captioned case, *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (Brown, J., concurring and dissenting). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a). The Director also has requested reconsideration by the permanent members of the Board *en banc*. *See* 20 C.F.R. §802.407(b). Employer has not responded to these motions. In addition, claimant's counsel has filed a petition seeking an attorney's fee for work performed before the Board, to which employer has not objected. We grant the motions for reconsideration and will consider the issues *en banc*. Pertinent to these motions, in the original decision, the Board vacated and modified the administrative law judge's average weekly wage finding, holding that claimant's 1984 vacation and holiday pay should be included in claimant's average weekly wage, rather than the vacation and holiday pay claimant received in 1985. *Sproull*, 25 BRBS at 106. The Board also held that employer should receive a credit for disability payments made to claimant for an unrelated injury for the days, post-injury, employer paid claimant holiday pay under

the union contract.[1] *Sproull*, 25 BRBS at 107-108.

In this decision, all permanent members of the Board vote to reaffirm the Board's prior holding that claimant's 1984 holiday pay should be included in claimant's average weekly wage. Two members, in a separate opinion, vote to reaffirm the Board's decision that claimant's 1984 vacation pay should be included in his average weekly wage; two members would reverse the Board's holding and would affirm the administrative law judge's inclusion of vacation pay earned in 1984 and received in 1985 in claimant's average weekly wage. As a result of these votes, the Board's prior decision on average weekly wage is affirmed in its entirety. 20 C.F.R. §801.301(c). All members vote to vacate the Board's determination that employer is entitled to a credit for disability compensation paid to claimant on holidays.

To recapitulate, claimant was employed by Stevedoring Services of America when he was injured by a fall at work on January 10, 1985. On April 17, 1985, Dr. Cohen performed an open repair of claimant's left rotator cuff, and released claimant to return to "modified work" on September 16, 1985.

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[1] The Board also affirmed the administrative law judge's finding that claimant has a loss in wage-earning capacity and is entitled to an award for permanent partial disability under Section 8(c)(21), 33 U.S.C. §908(c)(21), and it reversed the administrative law judge's award of relief pursuant to Section 8(f), 33 U.S.C. §914(f) on an award of past-due interest.

Cl. Exs. 11, 12: Emp. Ex. 21. In a closing examination report dated May 20, 1988, Dr. Cohen opined that claimant suffered a loss of strength of the left shoulder of at least twenty percent, but did not impose any work limitations. Claimant was examined by Dr. Langston on January 12, 1989 at employer's request, and he evaluated claimant's impairment as a seven percent permanent loss of function of his left arm, but did not recommend further treatment. See Emp. Ex. 22. Claimant sought permanent partial disability benefits, contending he has a loss in wage-earning capacity.

The administrative law judge found that claimant suffered a loss in wage-earning capacity and awarded him permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). The administrative law judge found that at the time of the injury, claimant had an average weekly wage of $854.55. Decision and Order at 3. The administrative law judge derived this figure by adding to claimant's earnings the vacation and holiday payments he received in 1985 and subtracting the vacation and holiday payments received in

1984.[2] In addition, the administrative law judge denied employer a credit for vacation and holiday pay claimant received during the period he was also receiving temporary total disability for a prior injury. Decision and Order at 5.

In his motion for reconsideration, claimant requests that the Board reconsider its treatment of holiday pay and vacation pay in claimant's average weekly wage, and modify its decision to affirm the administrative law judge's findings on these issues. The Director also contends that the Board erred in holding that vacation and holiday pay should be accounted for in the year they are received in computing claimant's average weekly wage. Claimant and the Director contend that because claimant only earned the right to receive holiday and vacation pay in 1984, the year prior to the injury, and did not receive actual payment until 1985, the administrative law judge properly included the 1985 holiday and vacation pay in claimant's average weekly wage. In addition, claimant and the Director assert that the Board erred in permitting employer to

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[2] The administrative law judge further added the approximate sum claimant would have earned during the seven weeks in 1984 that he was off work due to a prior injury. Specifically, after making his calculations involving the holiday and vacation pay for a total of $38,454.82, the administrative law judge divided this figure by the 45 weeks the administrative law judge found claimant was available to work in the year preceding the injury, and arrived at a figure of $5981.85 for the remaining seven weeks of the year. The total of $44,436.67 was divided by 52 for an average weekly wage of $854.55.

receive a credit for its disability payments on the days claimant received holiday pay.

Average Weekly Wage

In its Decision and Order, the Board vacated and modified the administrative law judge's permanent partial disability award based on its determination that the administrative law judge incorrectly calculated claimant's average weekly wage. To determine claimant's overall average weekly wage, the Board referred to the contractual language in the collective bargaining agreement between employer and the union.

Initially, the Board noted that holiday and vacation pay are not paid in the same manner. The agreement indicates that "[p]ayment for each 'paid holiday' shall be made on the second payday following the payroll week in which the 'paid holiday' falls." Emp. Ex. 31. Inasmuch as holiday pay is paid within two paydays of the payroll week the holiday falls in, and not delayed a year as the administrative law judge found, the Board held that holiday pay actually paid in 1984 should be included in claimant's 1984 average weekly wage. Claimant and the Director assert that as claimant only earned the right to holiday pay by virtue of his employment in 1984 and was not actually paid for it until 1985, the administrative law judge

correctly included the 1985 holiday pay in claimant's average weekly wage.

We deny the relief requested on this issue, as the holiday pay received in 1985 is compensation for a specific day in 1985, after the injury occurred, and should not be included in pre-injury average weekly wage. As claimant and the Director note, in 1984, claimant only earned the entitlement to be compensated for a holiday when it occurred in 1985. A pre-requisite to entitlement to holiday pay had to be met before claimant was paid for the 1985 holiday, i.e., the holiday had to occur. Thus, 1984 holidays were paid in 1984 based on entitlement earned in 1983, and the pay for these days should be included in the average weekly wage for the 52 weeks preceding the injury. Inclusion of the pay for the 1984 holidays allows for a readily calculable average weekly wage in the 52 weeks preceding the injury in the event employer wishes to institute voluntary payment of benefits, and is not contingent upon the occurrence of a future event, i.e., the occurrence of the actual holiday. Accordingly, we hold, on the facts of this case, that the holiday pay actually paid in the 52-week period preceding the injury is to be included in claimant's average weekly wage, and the Board's prior holding on this issue is reaffirmed.

With regard to vacations, however, the collective bargaining agreement states that:

> In any payroll year, each longshoreman who is registered and qualified on December 31 of the calendar year in which he earns his vacation shall receive a vacation with pay the following year at the straight-time hourly rate to which the employee was entitled . . . on January 1 of the calendar year in which vacations are paid.

Emp. Ex. 31. The document further notes that "[v]acation checks will be distributed in the first week of April of the calendar year in which the vacations are paid." *Id.* The Board held in *Parks v. John T. Clark & Son of Maryland, Inc.*, 9 BRBS 462 (1978)(Smith, C.J., dissenting), that vacation pay and container royalty pay paid to the claimant after his injury could be used in calculating his average weekly wage because they were earned by claimant over the course of the contract year containing the injury. In *Parks*, the union contract specified that the benefits were to be paid out at the end of the contract year. The Board held that container royalty and vacation pay paid to the claimant after his injury could be used in calculating claimant's average weekly wage because they were earned over the course of the calendar year containing the injury. *Parks*, 9 BRBS at 465. The Board also noted that had the contract not so specified, the claimant would have been entitled to these benefits as they were earned. *Parks*, 9 BRBS at 465-466.

Similarly, as claimant and the Director contend in their motions for reconsideration, in this case the contract specified that vacation pay earned in one calendar year was to be paid the following April. Emp. Ex. 31. The Board based its original holding on the rationale that this case differed from *Parks* inasmuch as the vacation pay earned in 1984 was to be paid the following April at 1985 wage rates. *Sproull*, 25 BRBS at 106. Claimant urges the Board on reconsideration to not depart from the holding in *Parks*, and, notes that wage rates did not change under the contract until July 1 of the following year, and thus the vacation pay earned in 1984 would have been paid at the same rate whether it was paid in April 1985 or at the end of the contract year as in *Parks*. *See* Cl. Ex. 21. In the present case, claimant earned the vacation pay he received in April 1985 by his work through December 31 of the prior calendar year, 1984. Moreover, the contract actually provided that the vacation would be paid based on the straight hourly rate applicable on January 1 of the year in which vacations are paid. Because the wage rate did not increase until July 1985, claimant's vacation pay would have been based on the rate applicable from July 1, 1984 to June 30, 1985. Thus, the facts in *Parks* are indistinguishable from the facts herein and the holding in *Parks* supports the administrative law judge's inclusion of the 1984 vacation pay which was paid in 1985 in claimant's average weekly wage. Accordingly, we would grant the motions for reconsideration on this issue. We would reverse the Board's prior holding on

the issue of vacation pay and affirm the administrative law judge's inclusion of vacation pay earned in 1984, but received in 1985, in claimant's average weekly wage.[3]

Credit

The administrative law judge found that while a credit would be appropriate for payments made as advances of disability compensation, the vacation and holiday pay should not be credited where, as here, they are based on the hours worked in the prior year. Decision and Order at 5. In its original Decision and Order, *citing Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990) and *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989), the Board affirmed the

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[3] We disagree with our colleagues' conclusion that Section 10 of the Act requires computation of average weekly wage on a "cash" basis. Section 10 states that average weekly wage is to be determined "at the time of the injury." 33 U.S.C. §910. Three methods for calculating average weekly wage are provided in subsections (a), (b), and (c). The administrative law judge here applied subsection (3), finding that subsections (a) and (b) could not reasonably and fairly be applied. The administrative law judge's use of subsection (c) is unchallenged. Under that subsection, an average weekly wage is based upon the annual earning *capacity* of the injured employee. The Section 10(c) inquiry is not limited to actual earnings but includes earning potential, and the administrative law judge may consider relevant factors including, for example, wages which would have been earned post-injury. *See Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). There is thus no basis in the Act to limit a Section 10(c) calculation to cash received in the year prior to injury. Here, we would affirm the administrative law judge, as his decision is fully consistent with the statute.

administrative law judge's determination that employer does not get a credit for the holiday pay paid during the period of temporary total disability in 1985 for the unrelated hand injury, but held that employer is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the union contract. *Sproull*, 25 BRBS at 107-108. The Board also affirmed the administrative law judge's denial of a credit for vacation pay based on the fact that claimant qualified for and earned his vacation in the prior year.

The Board held in *Andrews* that because claimant incurred no wage loss on the days he received holiday pay, employer is not required to pay him compensation under the Act for these days. *Andrews*, 23 BRBS at 174. The contract in *Andrews* specifically provided for payment of compensation on holidays that occurred while employees were off work due to on-the-job injuries. Thus, the Board held that as the holiday pay was "intended in lieu of compensation," claimant incurred no wage loss on the days he received holiday pay. *Andrews*, 23 BRBS at 174. In the present case, however, there is no evidence of a provision for the payment of holiday pay in lieu of compensation. Consequently, claimant arguably did incur a wage loss because, pursuant to the union contract, he was entitled to a paid holiday whether or not he worked. Moreover, registered employees who were eligible for a paid holiday could work on the holiday and receive payment as prescribed in the collective bargaining agreement. Thus, as

claimant asserts, had he not been injured, he could have received both his holiday pay and wages. As the facts in *Andrews* are distinguishable, and employer has not established that the holiday pay provided for in the contract is in lieu of compensation, the holding in *Andrews* is not controlling in the instant case.

Accordingly, we vacate the Board's prior determination that employer is entitled to a credit for disability compensation paid to claimant on holidays.[4]

Attorney's Fee

Claimant's attorney also petitions the Board for a fee for work performed before the Board. Claimant's counsel requests a fee in the amount of $6,625 for 43.75 hours of legal services at the rate of $150 per hour and 1.25 of a legal assistant's time at the rate of $50 per hour.

In its original decision, the Board reversed the deputy commissioner's denial of a Section 14(f) penalty on overdue interest payments, and this issue is not contested in the

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[4] We reject, however, claimant's contention that no credit is owed because the Pacific Maritime Association (PMA) rather than the employer made the holiday and vacation payments, inasmuch as pursuant to the union contract, PMA served as employer's agent for disbursement of these funds. *See* Emp. Ex. 31, p. 61.

Motions for Reconsideration. Claimant also was successful in defending some of the issues involved in the original appeal, such as employer's argument that claimant did not suffer a loss in wage-earning capacity. Therefore, we award counsel an attorney's fee for work performed before the Board in the initial appeal. *See generally Bonds v. Smith & Kelly Co.*, 21 BRBS 240, 243 (1988); *Cutting v. General Dynamics Corp.*, 21 BRBS 108 (1988). This includes the dates from March 24, 1989 to October 24, 1991 for a total of 37.5 hours of legal services and 1.25 hours of services performed by a legal assistant.

The remaining hours, not including the work on the fee petition on May 28, 1992, are for work performed on the Motion for Reconsideration. Inasmuch as we reverse the holding that employer is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the union contract, claimant's counsel has been successful in his motion for reconsideration by the Board. Thus, we award claimant's counsel the remaining 4.75 hours for legal services performed on and after November 14, 1991.

However, we disallow the 1.5 hours spent preparing the fee petition, as this service was not reasonably necessary to protect claimant's interests. *Shaller v. Cramp Shipbuilding and Dry Dock Co.*, 23 BRBS 140 (1989); *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). The Board has long held

that the preparation of a fee petition is non-compensable. *See Verderane v. Jacksonville Shipyards, Inc.* 14 BRBS 220.15 (1981); *Keith v. General Dynamics Corp.*, 13 BRBS 404 (1981); *Staffile v. International Terminal Operating Co., Inc.*, 12 BRBS 895 (1980); *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). The Board has noted that attorneys should keep regular records of the time they devote to each case and that the preparation of the fee application should be, for the most part, a clerical function included in overhead expenses. *Morris*, 10 BRBS at 383.

Claimant contends that the United States Court of Appeals for the Ninth Circuit has indicated in other fee-shifting statutes that time spent in preparing a fee petition is compensable. *See Davis v. County and City of San Francisco*, 976 F.2d 1536 (9th Cir. 1992) (Title VII Action pursuant to 42 U.S.C. §2000e-5(k)); *D'Emanuele v. Montgomery Ward & Co., Inc.*, 904 F.2d 1379 (9th Cir. 1990) (ERISA action under 29 U.S.C. *§1132(g));Clark v. City of Los Angeles*, 803 F.2d 987 (9th Cir. 1987) (under 42 U.S.C. §1988 time spent preparing fee petition is compensable); *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985) (bankruptcy counsel were entitled to compensation for time and effort spent in preparing attorney's fee applications). These cases, however, do not stand for the proposition that all fee-shifting statutes require that an attorney be compensated

for the time spent preparing a fee application.[5]

Moreover, the fee request in most longshore cases is quite small in comparison to the fees requested in civil rights cases, where litigation is often complex and lengthy. *See Hensley v. Eckerhart*, 461 U.S. 424 (1988). Thus, the fee petitions will necessarily be shorter and less complex. Furthermore, unlike the fee petition in the present case, fee applications in the bankruptcy cases are required to be extremely detailed. *See Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (5th Cir. 1980). The fee petition in *In re Nucorp Energy*, was a detailed account required by the court which totaled more than 400 typewritten pages describing in detail the services rendered by some 40 attorneys and paralegals over a six--month period and involved approximately 6,500 hours of professional, time. *In re Nucorp Energy*, 764 F.2d at 659 n.3. In the present case, we see no compelling reason to depart from the Board's longstanding holding that time spent preparing a fee petition is not compensable. *Shaller*, 23 BRBS at 140.

Inasmuch as the remaining hours requested are reasonably

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[5] We note that the implementing regulations of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.*, which has incorporated Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, *see* 30 U.S.C. §932(a), provide that no fee approved shall include payment for time spent in preparation of a fee application. 20 C.F.R. §725.366(b).

commensurate with the necessary work done, claimant's counsel is entitled to a fee in the amount of $6,400 representing 42.25 hours of legal services at the hourly rate of $150 and 1.25 hours of services performed by a legal assistant at $50 per hour to be paid by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Director's and claimant's motions for reconsideration *en banc* are granted. We reaffirm the Board's previous holding on the issues of holiday and vacation pay. In addition, we vacate the Board's prior determination that employer is entitled to a credit for disability compensation paid to claimant on holidays for which he received holiday pay. Claimant's attorney is awarded a fee of $6400 for work performed before the Board to be paid directly to counsel by employer.

SO ORDERED.

ROY P. SMITH, Administrative Appeals Judge, concurs.

BROWN, Administrative Appeals Judge, concurring in part:

The procedural history of this case, and the facts, are amply set forth in the Decision and Order in *Sproull v.*

Stevedoring Services of America, 25 BRBS 100 (1991) (Brown, J., concurring and dissenting). In that decision, the Board vacated and modified the administrative law judge's average weekly wage finding in a permanent partial disability award, holding that claimant's vacation and holiday pay should be accounted for in the year it is received, rather than the year in which it is earned. The Board also held that employer should receive a credit for disability payments made to claimant for an unrelated injury for the days, post-injury, employer paid claimant holiday pay under the union contract. The Director and claimant have filed Petitions for Reconsideration *en banc* which have been granted. The Board has denied the relief requested on the issue of holiday pay, a result with which we agree. We also agree with the decision to grant the relief requested on the credit issue. All members of the Board agree on these issues.

With regard to the issue of vacation pay, however, we disagree with our two colleagues who would grant the relief requested. In our opinion the Board properly decided that the vacation pay received in the year prior to the injury should be included in the calculation of the average weekly wage, rather than the vacation pay received after the injury on the theory that it had been "earned" in the year prior to the injury. Therefore, as there is no majority in favor of granting relief on

this issue, *see* 20 C.F.R. §801.301[6], the relief requested by the parties on reconsideration of the average weekly wage issue is denied and the Board's prior opinion affirmed for the following reasons.

An employee's average weekly wage is to be determined as of the time of his injury. In order to do this Section 10 of the Act, 33 U.S.C. §910, sets forth *various formulas which relate to the year before the injury.* This is normally done by looking at the payroll for the year *preceding* the injury. The calculation must be done promptly and compensation must be made within 14 days after it becomes due to avoid a 10 percent penalty. *See* 33 U.S.C. §914(e).

While we agree with our colleagues that holiday payments actually received made in the year prior to injury should be included in the average weekly wage calculation, our disagreement relates to the payments to be included for vacation pay. We would include vacation payments made to and received by the employee in the year *prior* to the injury, rather than payments made in the year following the injury.

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[6] Section 801.301(c) provides:

> A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members sitting en banc.

20 C.F.R. §801.301(c).

Here the injury was on January 10, 1985, and we would include in the calculation any vacation pay received in April 1984, that is, within the year prior to the injury, not the vacation pay received in April 1985, after the injury, as our colleagues would.

The opinion of our colleagues is based on the union contract on the theory that subsequent payment was "earned" in the prior year. Our view is that a vacation is paid in April of a particular year because of the employee's wages and number of hours worked in the prior calendar year. This is what "entitled" the employee to a vacation the following year. He receives it only if he is "registered and qualified" on December 31 of a given calendar year. Emp Ex. 31, union contract 7.1. If eligible, payment is to be made the following April based on the hourly rates in effect on January 1 of that following year.

We reaffirm the Board's original decision to calculate the average weekly wage based upon payments received in the year prior to the injury. This method of calculation is, in essence, a cash method of accounting for the wages claimant received in the year prior to the injury and allows for an easy calculation of the wages claimant received prior to the injury. Our colleagues' method with regard to vacation pay is an accrual method which will create needless administrative problems. Although an employer could make an initial

estimate of the average weekly wage at the time of injury, their view would postpone the calculation of the claimant's true average weekly wage until April of the following year. First, there would have to be a determination as to whether the longshore employee was "registered and qualified" on December 31 of any given year. Union contract 7.1, Emp. Ex. 31, p. 62. There is nothing in the record to indicate what the requirements are to be "qualified." If eligible, payment is to be made the following April based on the hourly wage rate as of January 1 of that year. The administrative headache will be caused by the fact that calculation and payment of compensation must be made promptly under Sections 10 and 14 of the Act. Subsequently, if an employee is "qualified" and receives vacation pay the following April, a final average weekly wage determination must be made at that time.[7] This was admitted by the claimant's counsel at oral argument in this

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[7] In addition to the lack of a statutory basis for this procedure, the impracticality of the method is readily apparent when one realizes that in many cases a claimant may be temporarily disabled for only a few months and then returns to work. He is back on the payroll, compensation is suspended and the employer files a Form LS-208 notifying the district director. Under the procedure used by the original panel, which we would affirm, based on payments received in the year prior to the injury, the case can be closed for all intents and purposes. Under the procedure urged by our colleagues, in the same fact situation referred to above, the case cannot be closed when the employee returns to work but must be reopened to readjust the average weekly wage calculation taking into account the post-injury payment of vacation pay. In other words, the case should be closed for all intents and purposes but the parties still do not know the basic figure which is needed to determine the compensation rate.

case. Transcript of Oral Argument p. 37. He also mentioned that this procedure would be applicable to all longshoremen operating on the West Coast, that is, to all longshoremen operating under the Pacific Coast Longshore Contract between the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association. Emp. Ex. 31, p. 59. Query whether this situation would arise at southern and east coast ports, or at shipbuilding and ship repair yards that would also be covered under the Longshore Act, but where the employees would be operating under different contracts. There was no answer to this question at the oral argument.

Two of our colleagues would hold that the 1985 vacation pay was "earned" in 1984. Here, again, is the accrual theory. An examination of Section 10 of the Act indicates, however, that in determining the average weekly wage of an injured employee you look to the "whole of the year" immediately preceding the injury. The annual "earnings" are arrived at by a multiple of the average daily "wage" or "salary" of the employee, or, in some cases, of an employee of the same class. The average annual "earnings" are then divided by 52 to get back to the average weekly "wage." The terms are used interchangeably but the whole thrust is to calculate what the employee was paid in the year prior to the injury. The whole concept is to determine what was paid in the "year immediately preceding" the injury. There is no reference in

the statute to money paid following the injury.[8] The statute is clear. Two colleagues attempt to amend the statute by their interpretation of the contract between the union and management.

Accordingly, the Board's decision is reaffirmed to reflect the inclusion of vacation pay received in April of 1984 in the average weekly wage for the year immediately preceding claimant's January 10, 1985 injury. In all other respects, we concur.

REGINA C. McGRANERY, Administrative Appeals Judge, concurs.

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[8] The administrative law judge stated that the provisions of Section 10(a) and (b) could not be fairly applied and that his calculation of average weekly wage was made under §10(c). In footnote 3 two colleagues state that this involves a determination of earning *capacity* and is not limited to actual earnings. They point out that it could include earning potential and possibly future earnings. On the facts of this case, these comments are irrelevant. Although the administrative law judge indicated he used Section 10(c), he did not follow the criteria of that section. For instance, there was no determination of potential or future earnings or, in fact, earning capacity. Furthermore, no regard was given to the earnings of other employees of the same or most similar class or in employment in the same or neighboring locality. The administrative law judge actually used a modified Section 10(a) method, relied solely on actual earnings, divided the total amount paid by 45 rather than 52, to account for 7 weeks lost due to a prior injury and arrived at his calculation of $854.55 as the average weekly wage. The only error is that this figure was based, in part, on vacation pay received in 1985, after the injury, rather than the vacation pay received in 1984, in the year prior to the injury.

APPENDIX C

APPENDIX C

CHARLES SPROULL, Claimant-Respondent,
Cross-Petitioner, Petitioner,
v.
STEVEDORING SERVICES OF AMERICA and
EAGLE PACIFIC INSURANCE COMPANY,
Employer/Carrier-Petitioners,
Cross-Respondents, Respondents, and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR, Respondent,
Cross-Petitioner.

BRB Nos. 89-1209, 89-1209A,
89-1209B and 90-804

U. S. Department of Labor
Benefits Review Board

Issued October 18, 1991

Before: Stage, Chief Administrative Appeals Judge, Brown, Administrative Appeals Judge, and Feirtag, Administrative Law Judge, sitting by designation

DECISION and ORDER

STAGE, Chief Administrative Appeals Judge:

Employer appeals, and claimant and the Director, Office of Workers' Compensation Programs (the Director) cross-appeal, the Decision and Order (88-LHC-2392) of Administrative Law Judge Alfred Lindeman awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). Further, employer appeals the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fee, and claimant appeals the Denial of Assessment of 20 Percent Penalty-Section 14(f) on Interest of Deputy Commissioner Karen P. Goodwin. We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The deputy commissioner's determinations will be affirmed unless shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986). The Board held oral argument in this case on May 20, 1991, in Lake Oswego, Oregon.

Claimant was employed by Stevedoring services of

America when he was injured by a fall at work on January 10, 1985. On April 17, 1985, Dr. Cohen performed an open repair of claimant's left rotator cuff, with an acromioplasty. Cl. Ex. 11. Dr. Cohen released claimant to return to "modified work" on September 16, 1985. Cl. Ex. 12; Emp. Ex. 21. In a closing examination report dated May 20, 1988, Dr. Cohen opined that claimant had suffered a loss of strength of the left shoulder of at least twenty percent, but did not impose any work limitations. Claimant was examined by Dr. Langston on January 12, 1989 at employer's request. Dr. Langston evaluated claimant's impairment as a seven percent permanent loss of function of his left arm, but did not recommend further treatment. *See* Emp. Ex. 22.

Before his injury, claimant worked nights, allowing for earnings at higher rates than day work and additional employment during the days at "tie-up" jobs. Since September 16, 1985, claimant has worked during the day, mostly as a slingman, as an "extra" gang boss, and as a dockman. Claimant sought permanent partial disability benefits.

The administrative law judge found that at the time of the injury claimant had an average weekly wage of $854.55, and that claimant reached maximum medical improvement on September 16, 1985. Decision and Order at 3. After adjusting claimant's post-injury wages to reflect a fifteen percent contractual wage increase, the administrative law

judge found claimant's present wage-earning capacity to be $710.27 weekly. Decision and Order at 5. Thus, the administrative law judge awarded claimant temporary total disability benefits from January 11 through September 15, 1985 and permanent partial disability benefits since September 15, 1985 based on his loss in wage-earning capacity. 33 U.S.C. §908(b), (c)(21). Decision and Order at 5. The administrative law judge denied employer a credit for vacation and holiday pay it paid claimant during the period claimant was also receiving temporary total disability, as he found the payments should be credited to the prior year, when claimant earned that pay. Decision and Order at 5. Further, the administrative law judge granted employer relief under Section 8(f), 33 U.S.C. §908(f), as he found that claimant suffered from a manifest pre-existing permanent partial disability that materially and substantially contributed to claimant's greater permanent partial disability. Decision and Order at 6. Finally, in a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge found that due to the nature of the case, the quality of the representation and the result achieved, the requested attorney's fee was reasonable, and thus, ordered employer to pay $5,332.61 to claimant's attorney. Supplemental Decision and order Awarding Attorney's Fees. In a Compensation Order dated February 8, 1990, the deputy commissioner denied an assessment of a twenty percent Section 14(f) penalty on unpaid interest due

pursuant to the administrative law judge's Decision and Order. 33 U.S.C. §914(f).

On appeal, employer contends that the administrative law judge erred in his determination of claimant's average weekly wage and in denying employer a credit for vacation and holiday pay it paid claimant during the temporary total disability period. In addition, employer contends that the administrative law judge erred in finding claimant has a loss in wage-earning capacity and urges the Board to vacate the award of the attorney's fee if the administrative law judge's Decision and Order is reversed. Claimant and the Director respond, urging affirmance of the administrative law judge's award of benefits. Claimant cross appeals the decision, urging the Board to instruct the administrative law judge to consider the change in claimant's work opportunity in evaluating his residual earning capacity, if the Board decides to remand the claim. The Director also cross appeals, contending that the administrative law judge erred in awarding employer relief under Section 8(f). Employer responds, urging affirmance of the award of Section 8(f) relief if the award of compensation is not reversed or vacated. Employer also contends that this is an appropriate case for the Board to consider assessing its costs against the Director pursuant to Section 26 of the Act, 33 U.S.C. §926, because the Director's appeal an the Section 8(f) issue is groundless. Finally, claimant appeals the deputy commissioner's denial of a Section 14(f) penalty, contending

that, although employer paid compensation on time, it did not pay interest on time. The Director agrees with claimant's position on this issue.

Average Weekly Wage

Initially, employer contends that the administrative law judge erred in his determination of claimant's average weekly wage. Employer contends that the administrative law judge should not have subtracted the holiday and vacation pay claimant received in 1984, the year prior to the injury, and added the holiday and vacation pay claimant received in 1985, because this pay should be credited as wages in the year it was received and subject to withholding tax. We agree.

Average weekly wage is calculated as of the time of the injury pursuant to Section 10 of the Act. 33 U.S.C. §910. The administrative law judge found that the provisions of Section 10(a) and Section 10(b) could not be fairly applied in this case for several reasons. First, the administrative law judge stated that "it is not clear that claimant was a five or six day worker [Section 10(a)] and the pertinent information regarding other workers is not established [Section 10 (b)]." Decision and Order at 2. Next, the administrative law judge found claimant's earnings prior to the subject injury were artificially diminished due to lost time for a prior injury. Finally, the administrative law judge determined that inasmuch as "the

payment of vacation and holiday pay was delayed by about a year it was possible that variations in the worker's or the industry's condition from one year to the next might have a distorting influence on earnings." Decision and Order at 2-3. Thus, the administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) and added the vacation and holiday pay claimant received in 1985 (post-injury), subtracted the vacation and holiday pay received in 1984 (pre-injury), and added the approximate sum claimant would have earned in the seven weeks from January 11 to March 1, 1984 had he not had a prior injury. Decision and Order at 3. The administrative law judge thus found that this formula yielded a total annual wage of $44,436.67 in the year preceding January 10, 1965, and an average weekly wage at the time of injury of $854.55. Decision and Order at 3.

Section 2(13) of the Act, 33 U.S.C. §902(13) (Supp. V 1987), defines "wages" as:

> The money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954. . . .

It is undisputed by the parties that vacation and holiday pay is to be included in determining claimant's average weekly wage. *See generally Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990). However, the dispute arises over whether to include in average weekly wage the vacation and holiday pay in the year in which it was received or in which it was earned. An administrative law judge has broad discretion in determining average weekly wage under Section 10(c). *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979).

The Pacific Coast Longshore Contract Document (the collective bargaining agreement) indicates that "[p]ayment for each 'paid holiday' shall be made on the second payday following the payroll week in which the 'paid holiday' falls." *See* Emp. Ex. 31. With regard to vacations, the collective bargaining agreement states that:

> In any payroll year, each longshoreman who is registered and qualified on December 31 of the calendar year in which he earns his vacation shall receive a vacation with pay the following year at the straight-time hourly rate to which the employee was entitled . . . on January 1 of the calendar year in which vacations are paid.

See Emp. Ex. 31. The document further notes that "[v]acation checks will be distributed in the first week of April of the calendar year in which the vacations are paid." *See* Emp. Ex. 31.

Thus, it is clear from the record that holiday and vacation pay are not made in the same manner. Unlike vacation pay, holiday pay is paid within two paydays of the payroll week the holiday fell in, and not delayed a year as the administrative law judge found. As the basis for the administrative law judge's determination on holiday pay is erroneous, we vacate his finding that in order to properly determine claimant's average weekly wage he must subtract the holiday pay received in 1984 and add the holiday pay received in 1985 as it is neither rational nor supported by substantial evidence.[1] Holiday pay earned in 1984 should be included in claimant's average weekly wage.

With regard to the treatment of vacation pay, we reach a similar result although on a different rationale. In *Parks v. John T. Clark & Son of Maryland, Inc.*, 9 BRBS 462 (1978) (Smith, C.J., dissenting), *rev'd on other grounds sub nom., John T. Clark & Son of Maryland v. Benefits Review Board,*

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[1] The amount of holiday pay the administrative law judge subtracted from claimant's earnings of $37,935.34 in 1984 was $1,536.08, and he added $1,821.56, increasing claimant's earnings by a difference of $285.48.

621 F.2d 93, 12 BRBS 229 (4th Cir. 1980), the Board held that vacation pay and container royalty pay paid to claimant after his injury could be used in calculating claimant's average weekly wage because they were earned by claimant over the course of the contract year containing the injury. In *Parks*, the union contract specified that the benefits were to be paid out at the end of the contract year. The Board noted that had the contract not so specified, claimant would have been entitled to these benefits as they were earned. The facts in the present case are dissimilar from Parks inasmuch as the contract specifies that vacation earned in 1984 is to be paid the following April based on the 1985 wage rate. Thus, the rationale in Parks does not address the situation in this case where inclusion of vacation pay earned in the year prior to injury results in claimant receiving this pay at post-injury rates. Indeed, in *Parks*, since claimant would have received the vacation as it was earned except for the contract, claimant may well have earned it based on pre-injury wage rates. We do not believe it is inconsistent with *Parks* to accept employer's contention in this case that vacation pay paid in 1984 at 1984 rates should be used for average weekly wage purposes.[2] We, therefore, hold that in this case the vacation

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[2] We reject, however, employer's contention that the definition of "wages" supports using the vacation pay paid in 1984. Since the vacation pay is subject to withholding taxes when it is paid, and Section 2(13) does not specify that the "advantage" received from the employer must be subject to

(continued...)

pay should be accounted for in the year it is received, because claimant only "qualified" in 1984 to receive a vacation in 1985, and therefore, his wages in 1984 should not include the vacation paid in 1985 at 1985 rates.[3] Thus, the administrative law judge erred in subtracting the vacation pay claimant received in 1984, $2,658.60, and adding the vacation pay received in 1985, $2,892.60, thereby erroneously increasing claimant's earnings in 1984 by $234.00. As a result, we vacate the administrative law judge's finding that claimant earned $38,454.82 and modify the Decision and Order to hold that the record shows that claimant actually earned $37,935.35 in 1984, the year prior to the injury, including the vacation and holiday pay.

Employer also contends that the administrative law judge erred in finding claimant worked in only 45 weeks of the year preceding the injury. Employer contends that claimant worked or was available to work 48 weeks of the prior year, and that this divisor should have been used to calculate what

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[2](...continued)
withholding the year it is "earned, Section 2(13) neither supports nor detracts from the administrative law judge's finding. *See* 33 USC. §902(13); *see generally Duncan, supra.*

[3] This holding also allows employers to readily calculate claimants' earnings at the time of injury in order to institute voluntary compensation payments and would eliminate delaying necessary information for up to one year, as the vacation pay is paid at the next year's pay rate in the April following the year it was earned.

claimant would have earned but for the prior unrelated hand injury. However, the payroll records indicate that claimant received only holiday pay and not wages during two weeks in January 1984 when he was off work on temporary total disability due to a hand injury suffered in October 1983. Cl. Ex. 16. Thus, we affirm the administrative law judge's finding that claimant worked in only 45 weeks of the year preceding the injury,[4] and hold that claimant's pre-injury average weekly wage was $843.00 ($37,935.35 divided by 45 weeks equals $843.00).

Credit for Vacation and Holiday-Pay

Employer also contends on appeal that the administrative law judge erred by denying employer a credit for vacation and holiday pay claimant received during the temporary total disability period in 1985 for the unrelated hand injury. Employer contends that the vacation and holiday payments were "wages" paid to claimant and taxed as such, pursuant to an industry-wide collective bargaining agreement. Therefore, employer contends, receipt of compensation at the full temporary total rate, plus receipt of wages, improperly

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[4] We will not address employer's contentions regarding the sufficiency of evidence as to whether claimant was off due to a disability in October 1984, inasmuch as the seven weeks the administrative law judge found that claimant was unable to work due to the prior hand injury fell from January 11 to March 1, 1984.

compensates claimant at a rate greater than the rate established by 33 U.S.C. §908(b). The administrative law judge found vacation and holiday pay are not to be credited where they are based an hours worked in the prior year. Decision and Order at 5. The collective bargaining agreement provides that:

> Registered employees eligible for a 'paid holiday' shall receive payment...whether they work or not. When registered employees who are eligible for a 'paid holiday' perform work on such holiday, their additional payment for working shall be as prescribed in Section 4 [of the agreement].

See Emp. Ex. 31. The record does not indicate what the agreement says as to whether an injured employee will receive both workers, compensation and holiday pay.

We affirm the administrative law judge's determination that employer does not get a credit for the holiday pay, but hold that it is entitled to a credit for its disability payments on the days employer paid claimant holiday pay under the union contract, and we modify the administrative law judge's Decision to reflect employer's entitlement to a credit for these days. *See* 33 U.S.C. §914(j); *Andrews v. Jeffboat., Inc.*, 23 BRBS 169 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). However, with regard to vacation pay, we

affirm the administrative law judge's denial of a credit for vacation pay paid during the period of temporary total disability and vice versa inasmuch as claimant earned qualified for and in the prior year. Vacation pay is dissimilar from holiday pay as it is not paid out for a specific day, but is earned over the course of the year based on various factors.

Wage-Earning Capacity

Finally, on appeal, employer contends that the administrative law judge erred in finding that claimant has a loss in wage-earning capacity. Employer contends that the administrative law judge erred at the outset by using the improperly inflated average weekly wage for comparison purposes. Employer also contends that there is no basis for the administrative law judge's finding that claimant's actual post-injury earnings do not fairly and reasonably represent his wage-earning capacity, and that the administrative law judge improperly adjusted the post-injury wages for inflation. Employer contends that the administrative law judge erred in basing his finding of an impairment in wage-earning capacity on claimant's loss of "tie-up" jobs, when his actual hours worked have increased since September 1985, because it is improper to compute permanent partial disability compensation for loss of wage earning capacity on the basis of an approximation of the amount that claimant would have

earned but for the injury, as compared to actual post-injury earnings. Claimant responds, urging affirmance of the administrative law judge's finding regarding wage-earning capacity.

The administrative law judge found that claimant's post-injury wage and hour averages are not a "fair measure of his post-injury earning capacity until adjustment is made for the increase in wage rates that has occurred since his injury." Decision and Order at 4. The administrative law judge then reduced claimant's post-injury average earnings by fifteen percent to reflect the difference in the hourly contract wage rate between 1984-85 and 1986-88.[5] Decision and Order at 4. Claimant has been an "A" longshoreman since 1966. Tr. at 35. In addition, the administrative law judge found that claimant "lost" fifteen percent of his total pre-injury hours as he was no longer able to perform "tie-up" jobs. Decision and order at 4. Thus, the administrative law judge found claimant entitled to temporary total disability compensation from January 11 through September 15, 1985, at the rate of $569.70 per week (two-thirds of his average weekly wage at the time of injury). Commencing September 15, 1985, the administrative law judge found he was entitled to permanent

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[5] The administrative law judge found claimant's average post-injury earnings to be $36,933.94 annually and $710.27 weekly after the adjustment for inflation.

partial disability benefits at the rate of $96.19 per week (two-thirds of the difference of his average weekly wage of $854.55 and his post-injury wage-earning capacity of $710-27). *See* Decision and order at 5.

Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier*

v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990) *Cook, supra; Bethard, supra.*

In the present case, the administrative law judge found that it was evident that claimant's seniority and age make his continuing work opportunities very stable. However, the administrative law judge then found that claimant's post-injury earnings are not a fair measure of claimant's post-injury wage earning capacity without an adjustment for the increase in wage rates that has occurred since his injury. Thus, contrary to employer's contention, the administrative law judge implicitly found claimant's post-injury wages representative of his post-injury wage-earning capacity. *See generally Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), cert. denied, 459 U.S. 1034 (1982). Contrary to another of employer's contentions, it is proper to make an adjustment for inflation even when post-injury earnings are representative of wage-earning capacity. *See generally Cook, supra.* Although the administrative law judge also stated that claimant worked 15 percent fewer hours because of his injury, he made no actual reductions in claimant's post-injury earnings other than that for inflation. We affirm the administrative law

judge's adjustment of the post-injury hourly rate back to the rate paid at the time of injury to weed out inflationary effects, and affirm his finding that claimant has a loss in wage-earning capacity, taking into account our holding that a lower average weekly wage is to be used in calculating claimant's benefits.[6] *See Richardson, supra; Cook, supra; Bethard, supra.*

Work Opportunity

On cross-appeal, claimant requests that, if the case is remanded to the administrative law judge, the administrative law judge be instructed to consider the change in work opportunity and its impact on claimant's loss of wage-earning capacity. Employer responds, urging rejection of claimant's contention.

Claimant's argument is that the increase in his hours is due to a "boom" period in the port in which he works. Claimant cites this passage from *Devillier, supra*:

> it may be unfair to allow no award to a clearly physically disabled worker who is working only

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[6] Because the administrative law judge's award is affirmed in some respects, including the finding that claimant has a loss in wage-earning capacity, the attorney's fee awarded to claimant's counsel is affirmed.

> because the economy is booming and would possibly lose his or her job in an economic slump.

Id., 10 BRBS at 656. However, in *Devillier*, the Board was merely analyzing all aspects of post-injury wage-earning capacity and was not holding that workers in such situations should be awarded benefits. The Board further stated, citing Professor Larson, that a person who has regular and continuous post-injury employment "must take chances on unemployment like everyone else." *Id.* at 658.

Section 8(c)(21) is designed to compensate injured employees for the amount of wage-earning capacity lost as a result of the injury. Thus, the Board has held that physical impairment alone will not entitle a claimant to benefits. Economic disability must be shown. *See Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984). Inasmuch as the record does not show that the increase in work opportunity has affected claimant's ability to perform his job as a result of the injury, and we affirm the administrative law judge's findings regarding claimant's loss of wage-earning capacity, we reject claimant's request to instruct the administrative law judge to consider the increase in available work opportunity on remand.

Section 8(f)

On cross-appeal, the Director contends that the administrative law judge erred in finding the evidence sufficient to support relief under Section 8(f). Although the Director agrees that claimant suffered from a manifest pre-existing permanent partial disability, the Director contends that the pre-existing disability did not contribute to claimant's current compensable disability. The administrative law judge found that "claimant had a preexisting permanent partial disability within the meaning of the Act prior to his 1985 shoulder injury, and that his permanent partial disability resulting after the 1985 injury is materially and substantially greater than would have resulted from the latter injury alone." Decision and Order at 6. The administrative law judge based this finding on claimant's testimony regarding the use of the arm and hand, "as well as the self-evident interrelationship between the use of the hand, grip-strength and shoulder in his post-injury dock work, and the recency of the 1983 left hand injury immediately prior to returning to work before the 1985 left shoulder injury." Decision and Order at 6.

Section 8(f) relief is available if employer establishes that claimant had a manifest pre-existing permanent partial disability that combined with the work injury to result in a greater degree of permanent disability. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974

(9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). Where a claimant is ultimately permanently partially disabled, employer is entitled to Section 8(f) relief only if it establishes that claimant's pre-existing disability combined with his disability due to the last work injury to produce a materially and substantially greater degree of disability. *Readel v. Foss Launch and Tug*, 20 BRBS 229 (1988). Disability is not defined in an economic sense alone; claimant's ability to work must be viewed in the context of his physical impairment and medical restrictions in order to determine whether he had a greater disability as a result of the combination of his injuries than would have resulted from the last injury alone. *Readel*, 20 BRBS at 233.

Although we reject the Director's contention that employer is not entitled to Section 8(f) relief because claimant's pre-existing hand injury has not contributed to a greater loss in wage-earning capacity, *Luccitelli v. General Dynamics Corp.*, ___ BRBS ___, BRB No. 89-3066 (Aug. 23, 1991), we nonetheless reverse the administrative law judge's award of Section 8(f) relief. In the present case, there are also no medical opinions of record stating that claimant's current disability is contributed to by his prior hand injury. *See generally Luccitelli*, slip op. at 5. Moreover, we reject employer's contention that the decision in *Todd Pacific Shipyards Co. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT) (9th Cir. 1990), supports the award of Section 8(f)

relief as that case deals with whether claimant's mental limitations were a pre-existing permanent partial disability for purposes of Section 8(f). In that case, the Director did not challenge the finding that the contribution element was satisfied. Further, employer's contention that costs should be imposed against the Director pursuant to Section 26 for appealing the Section 8(f) issue is rejected as the Director's position clearly has merit. *See Pinell v. Patterson Service*, 22 BRBS 61 (1989).

Section 14(f)

Claimant also appeals the deputy commissioner's denial of a Section 14(f), 33 U.S.C. §914(f), penalty on past-due interest. BRB No. 90-804. The deputy commissioner found that interest on the compensation due per the administrative law judge's Decision and Order was not paid until June 23, 1989, over ten days from the date the Order was filed.[7] The deputy commissioner concluded however that late payment of interest on compensation due under a compensation order is not subject to the twenty percent penalty provided in Section 14(f), and thus, declined to issue the order requested by claimant. *See* Compensation Order, Case No. 14-82112 at 2.

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[7] However, the benefits due pursuant to the Decision and Order were timely paid by employer.

Specifically, on appeal claimant contends that interest fits within the definition of "compensation" inasmuch as it is money payable to claimant pursuant to the Act, the parties can easily calculate the amount from the administrative law judge's award, and no further findings are necessary to determine claimant's benefits. Claimant notes that the purpose of interest is to compensate claimant for the lack of use of his benefits at an earlier date and to make a claimant whole. Therefore, claimant contends, in order to facilitate prompt payment of benefits, including interest, the Board should hold that interest is compensation for purposes of a Section 14(f) penalty. Section 14(f) of the Act provides, in relevant part:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty percentum thereof . . .

33 U.S.C. §914(f). Further, Section 2(12) of the Act defines "compensation" as "the money allowance payable to an employee or his dependents as provided for in this Act . . ." *See* 33 U.S.C. §902(12). Although the Board held in *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987), that interest is not "compensation" for purposes of Section 14(j), 33 U.S.C. §914(j), the effect of the holding in that case is to further the goal of fully compensating the

employee by not allowing employer an offset for its overpayments of disability compensation against interest awarded by the administrative law judges.[8] The purpose of the award of interest is to make sure claimant is fully "compensated." *See Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987). Inasmuch as the Section 14(f) penalty was intended by Congress to encourage prompt payment of benefits, we hold that interest is compensation for purposes of Section 14(f) as this will ensure that all benefits intended to make claimant "whole" will be promptly paid by employer. We, therefore, reverse the deputy commissioner's denial of a Section 14(f) penalty on overdue interest payments.

Accordingly, the administrative law judge's Decision and Order is modified to reflect an average weekly wage of $843.00, and ongoing permanent partial disability benefits of $88.69 per week from September 15, 1985, and to reflect employer's entitlement to a credit for its disability payments for days claimant received both temporary total disability benefits and holiday pay. His finding that claimant has a loss of wage-earning capacity and the award of an attorney's fee is affirmed. The award of Section 8(f) relief to employer is reversed. The deputy commissioner's denial of a Section 14(f) penalty on past-due interest also is reversed.

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[8] The Board noted that employer's payments of temporary total disability were not instituted until after the informal conference.

SO ORDERED.

ERIC FEIRTAG, Administrative Law Judge, concurs.

BROWN, Administrative Appeals Judge, concurring and dissenting:

Although I concur in the majority's decision with respect to the administrative law judge's Decision and Order, I respectfully dissent from my colleagues' decision to reverse the deputy commissioner's denial of a Section 14(f) penalty on past-due interest. The Board has previously recognized that awards of interest are not provided for by the Act itself, but are granted in appropriate instances "to ensure that those claimants entitled to receive (awards of overdue benefits] are fully compensated for their work-related injuries." *Cox v. Army Times Publishing Co.*, 19 BRBS 195,198 (1987); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984). In determining whether employer was entitled to a credit on an award of interest under Section 14(j) for compensation previously paid, the Board held that since awards of interest are not explicitly provided for by the Act and serve a different purpose than awards of benefits, interest is not compensation for the purposes of Section 14(j). *See* 33 U.S.C §914(j); *Castronova v. General Dynamics Corp.*, 20 BRBS 139 (1987). Therefore, inasmuch as interest is not explicitly

provided for by the Act, and since the subsections of Section 14 should be interpreted consistently, I would hold that interest is not compensation for purposes of Section 14(f). See 33 U.S.C. §§902(12), 914(f); *Castronova, supra.*

Section 14(f) of the Act provides that if any compensation payable under an award is not paid within ten days, there shall be added to the unpaid compensation, an amount equal to 20 per centum thereof. Here the award was paid within 10 days. Therefore, there was nothing additional to be added to the amount of compensation awarded. Claimant is contending that the interest provided for in the award was not paid until approximately three months after the award was filed. He contends that a 20 percent penalty be assessed. We are talking about three different things -- compensation, a penalty, and interest. Section 14(f) clearly applies the 20 percent penalty to compensation not paid timely. There is nothing in Section 14(f) applying the penalty to interest. Furthermore, as stated above, there are no provisions in the Act itself covering interest. It would appear, therefore, that Congress never contemplated applying a penalty on interest when it enacted Section 14(f). The Act provides for a penalty on top of compensation. Case decisions apply interest on top of compensation and interest on top of compensation augmented by a penalty. There is no provision however, by statute or case decision for a penalty on top of interest. The deputy

commissioner was correct in not applying a penalty to the interest in this case. [9]

[9] Since none of the parties has questioned the jurisdiction of the Board to hear a direct appeal of an order of the deputy commissioner, *cf. Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241, (7th Cir. 1981), I will not consider this issue.

APPENDIX D

APPENDIX D

In the Matter of
CHARLES SPROULL, Claimant,
v.
STEVEDORING SERVICES OF AMERICA,
Employer, and
EAGLE PACIFIC INSURANCE COMPANY,
Carrier,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

U.S. Department of Labor
Office of Administrative Law Judges

Filed March 16, 1989

Before: ALFRED LINDEMAN, Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act"). 33 U.S.C. §901 *et seq.*; 20 C.F.R. Parts 701 and 702; 29 C.F.R. Part 18. After a hearing held in Portland, Oregon,

on January 26, 1989, the contested issues presented for adjudication are: claimant's average weekly wage at the time of injury on January 10, 1985; the date claimant's condition reached maximum medical improvement; the nature and extent of disability, if any; the employer/carrier's liability for certain travel expenses claimant incurred in obtaining medical treatments; the employer/carrier's entitlement to a credit for vacation and holiday pay claimant received while he was also receiving temporary total disability compensation; and the employer/carrier's entitlement to relief under section 8(f) of the Act.

Findings of Fact and Conclusions of Law

Claimant, a 58 year-old longshoreman, was injured on January 10, 1985, when he fell "spread-eagle" onto his left side. After examination by his family doctor in Longview, he came under the care of a Portland orthopedist, Dr. Lawrence Cohen. Rotator cuff surgery was performed on April 17, 1985. Claimant was released to return to work on or about September 16, 1985. Whereas before his injury he had worked nights, allowing for earnings at higher rates than day-work and additional employment during the days at so-called "tie-up" ("linesman") jobs, once he returned to work he has been limited to dock work off the "old man's board," which work has nonetheless produced more hours and higher yearly earnings than before his injury.

Average weekly wage

The parties essentially agree that in the 52 week period before his January 10, 1985 injury claimant received earnings in the total amount of $37,935.34; that as a result of a prior injury to his left hand (in October 1983) he was not able to work in the first weeks of that 52 week period (i.e., the seven weeks from January 11 until March 1, 1984; *see* CX 16, p. 29; EX 32, p. 80);[1] that pursuant to union agreement, the $37,935.34 in earnings *included* vacation pay of $2,658.60 received in April 1984 for work performed in calendar year 1983 and holiday pay of $1,536.08 received in 1984 based on his work in calendar year 1983 (CX 16, p. 29); and, similarly, that the $37,935.34 *excluded* vacation pay of $2,892.60 received in April 1985 for work performed in calendar year 1984 and holiday pay of $1,821.56 received in 1985 based on his work in 1984 (CX 16, pp. 30-31).

I find that the provisions of section 10(a) and (b) of the Act cannot fairly be applied in this case for several reasons. First, it is not clear that claimant was a five or six day worker and the pertinent information regarding other workers is not established. Second, since claimant did not work seven weeks from January 11 until March 1, 1984, his earnings for the 52

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[1] "CX", "EX", and "TR" refer respectively to Claimant's and the Employer/carrier's exhibits, and to the transcript of the hearing.

week period prior to January 10, 1985, were artificially diminished. Third, since the payment of vacation and holiday pay was delayed by about a year it was possible that variations in the worker's or the industry's condition from one year to the next might have a distorting influence on earnings (though it is noted the differences in this case produce a net effect of only $500). In such circumstances, I set claimant's average weekly wage by: 1) adding to his 52 week earnings of $37,935.34, the vacation and holiday, payments received in 1985 ($2,892.60 and $1,821.56), and subtracting the vacation and holiday payments received in 1984 ($2,658.60 and $1,536.08), which produces a total of $38,454.82; 2) adding $5,981.85, which is the approximate sum claimant would have earned in the seven weeks from January 11 to March 1, 1984, had he not had a prior injury (i.e., $38,454.82 divided by 45 weeks remaining after returning to work following the prior injury equals $854.55 per week; $854.,55 x 7 equals $5,981.85). This yields a total annual wage of $44,436.67 in the year preceding January 10, 1985; and an average weekly wage at the time of injury of $854.55. 33 U.S.C. §§910(c), 910(d).

Date of maximum medical improvement

Claimant's treating doctor, Lawrence J. Cohen, M.D., stated on September 10, 1985, "I examined claimant today and it is my feeling that he may return to modified work on

Monday, September 16, 1985." CX 12. Later, by letter report dated March 14, 1986, Dr. Cohen noted that although he had released claimant the prior September to "do limited work over a period of the next two months to allow the shoulder to come back to normal," claimant had not come back for a November 25th visit and had not been seen since. CX 13. It was not until May 15, 1986, that Dr. Cohen next saw claimant, at which time he stated "there will be some mild permanent disability" and "no further treatment is indicated." CX 14.

Regardless of the limitations imposed when claimant was released to return to work, I find that the overriding consideration is that once claimant resumed work after the September 10, 1985 examination, he was not *treated* again, even at the time of the May 15, 1986 exam. Accordingly, I find that his condition was permanent and stationary for purposes of the Act when he returned to work pursuant to Dr. Cohen's release on September 16, 1985. *See* CX 3.

Nature and extent of disability

As indicated, since returning to work, claimant has been able to fully perform as a dockman working off the old man's board and, though working days, has worked more hours and garnered higher earnings than before his January 1985 injury. He contends, however, that his actual earnings are not a fair

and reasonable measure of the effects of his shoulder injury, because he is unable to work the night jobs he used to due to the fact that they involve overhead work and climbing that he cannot do because of his shoulder condition. Thus, he argues that he no longer earns the wages he would be earning had he not had his shoulder injury; he also claims that because he now must work days he cannot obtain the extra hours he used to accrue doing "tie-ups." The employer/carrier argues that because claimant's post-injury work is continuous, stable and has produced longer hours and greater wages than before his shoulder injury, his actual earnings must be deemed a fair and accurate measure of his earning capacity under section 8(h) of the Act.

The record demonstrates that claimant's earnings and hours worked in each of the full calendar years he worked since returning to work in September of 1985 are as follows:

Year	Hours	Total wages
1986	1593.5	$36,072.64
1987	1728.5	$44,732.40
1988	1952.0	$49,550.03

CX 16, pp. 32-38. Thus, though the number of hours worked has indeed been greater than claimant worked before his shoulder injury, the average of $43,451.69 in annual earnings,

and $835.60 weekly, is less than the "adjusted" amounts he earned before the injury. In addition, I find that although it is evident that claimant's seniority and age make his continuing work opportunities very stable, these averages cannot be deemed a fair measure of his post-injury earning capacity until adjustment is made for the increase in wage rates that has occurred since his injury. (I note that the differences for vacation and holiday pay are insignificant and do not require further adjustment; e.g., there would only be a net effect of 20 hours from adjusting the vacation pay hours and no change in holiday pay, which was a constant 104 hours; *see* CX 17, pp. 42-45.) Since the record shows that the hourly contract wage rate was approximately 15% less in 1984-1985 than it was in 1986-1988,[2] I find that claimant's post-injury average earnings must be reduced to $36,933.94 annually and $710.27 weekly for purposes of comparison with his "adjusted" annual earnings of $44,436.67 and $854.55 average weekly wage at the time of injury.

In my judgment it would be too speculative to try to infer what claimant's earnings would be if he had remained in his

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[2] The average hourly rate for 1984-1985 was about $15.99 ($15.57 + $16.42 divided by 2) and for 1986-1988 it was about $18.84 ($17.27 + $19.43 + $19.83 divided by 3). CX 21.

old job.[3] I note, however, that if I were to focus on the hours he has "lost" as a "linesman," which is the major difference he claims has been caused by his injury, the result would be about the same; that is, in 1984 he worked 194.5 hours as a linesman, which is about 15 percent of the total 1329.5 hours he worked. CX 17, p. 41.

Accordingly, for the reasons discussed above, I find that claimant's actual wages since returning to work are not a fair and reasonable measure of his post-injury earning capacity. Instead, after adjustment for wage-rate increases, I set his post injury earning capacity at $36,933.94 annually and $710.27 week. 33 U.S.C. 908(h). I therefore find that claimant was entitled to temporary total disability compensation from January 11 through September 15, 1985, at the rate of $569.70 per week (two-thirds of his average weekly wage at the time of injury), and that since September 16, 1985, he has been permanently and partially disabled within the meaning of the Act, and entitled to compensation at the rate of $96.19 per week (two-thirds of the difference between his average weekly wage at the time of injury and his wage-earning capacity thereafter). 33 U.S.C. §§908(b), 908(c)(21). He is also

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[3] If the same wage rate differential (from $15.99 to $18.84 per hour) is applied to claimant's $44,436.67 annual wage in the year prior to injury, it would convert to $52,356.90 in 1988; however, there is no precise basis upon which to determine what *his* hours would have been had he remained uninjured. *See* CX 18.

entitled to mandatory interest at the rate(s) prescribed by 28 U.S.C. §1961 (1982) on any net amounts owing after a credit for any disability compensation previously paid, computed from the date each payment was due.

No credit for vacation and holiday pay received while on temporary total disability

The employer/carrier claims that since claimant received total vacation and holiday pay amounting to $3,756.31 in 1985 during the time he was also receiving temporary total disability compensation, EX 3; CX 3, the vacation and holiday payments must be credited to avoid treating him as if he were "more than totally disabled."[4] I disagree. While credits would be appropriate for payments made as advances of disability compensation or for wages received for time actually worked, I hold that regardless of how vacation and holiday pay may be treated for Internal Revenue purposes, they are not to be credited where, as here, they were based on hours worked in the *prior* year and where they have been properly factored into the average weekly wage and post-injury wage-earning capacity determinations. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (BRB 1984).

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[4] Though the employer/carrier's Hearing Memorandum states that the total amount is $3,756.31, *see* p. 2, I calculate the total of the applicable entries to be $3,896.44. CX 16, pp. 30-31.

Travel expenses

Claimant testified that since there was only one hospital in Longview, Washington (about 50 miles from Portland, Oregon), after being examined by his family doctor, who is not an orthopedist, he went to Dr. Cohen, an orthopedic specialist in Portland, who had been recommended by friends as "the best." It is undisputed that the claimed costs of claimant's travel to examinations and treatments by Dr. Cohen are $279.50. CX 4. The employer/carrier contends that cost should not be payable because claimant could have chosen an orthopedist in Longview.

Though I note that claimant's treating doctor in Longview, Dr. Robert Gaubatz, stated that he "ordinarily would not have referred Mr. Sproull to [Dr. Cohen], as he is not one of my regular consulting physicians," Dr. Gaubatz also said "[i]t is however my policy that I refer patients to specialists whom they want to see, if they have a preference." EX 11. Under these circumstances, and considering that the employer was on notice since at least March 8, 1985, that Dr. Cohen was treating claimant, EX 9, and the employer did not object, CX 4, I find that the claimed costs were and are properly payable by the employer/carrier under section 7 of the Act.

Section 8(f) applicability

The employer/carrier filed a timely application for relief under section 8(f), based on documented evidence that prior to claimant's January 1985 shoulder injury he had sustained two other industrial injuries that resulted in permanent impairment ratings and disability compensation settlements or awards. *See* EX 32. These included a low back injury in 1973 that resulted in a 10% impairment rating based on "limited capacity for heavy lifting," EX 32, p. 73, and a left hand injury in October 1983 that resulted in a permanent impairment rating and the expectation that claimant's grip strength "will not return to normal," EX 32, p. 75. The Deputy Commissioner denied the application on two grounds: the absence of evidence that any increased loss of earning capacity had resulted from the January 1985 injury, and the absence of proof that claimant's disability is greater because of the pre-existing conditions. EX 33. The first basis of denial has been removed by virtue of my findings above that claimant's wage-earning capacity has been reduced by about 15% because of the 1985 shoulder injury.

Taking into consideration claimant's testimony that in performing his work on the dock he has learned to use mostly his right arm and hand in handling slings, as well as the self-evident inter-relationship between the use of the hand, grip-strength and shoulder in his post-injury dock work, TR 49,

and the recency of his 1983 left hand injury immediately prior to returning to work before the 1985 left shoulder injury, I find that claimant had a pre-existing permanent partial disability within the meaning of the Act prior to his 1985 shoulder injury, and that his permanent partial disability resulting after the 1985 injury is materially and substantially greater than would have resulted from the latter injury alone. The employer/carrier's liability for permanent partial disability compensation is therefore limited to 104 weeks from September 16, 1985, with payments thereafter due from the Special Fund. 33 U.S.C. §§908(f)(1), 908(f)(2), 944.

Attorney's fees and costs

Claimant having prevailed in obtaining an award greater than that paid or proffered by the employer/carrier, his reasonable attorney's fees and costs are payable by the employer/carrier. Claimant's counsel may file an appropriate fee and cost petition and serve a copy on opposing counsel, who shall have ten days from service to file any objections.

ORDER

It is therefore ordered that:

1. The employer/carrier shall pay claimant compensation for his temporary total disability from January

11 through September 15, 1985, at the rate of $569.70 per week; and compensation for his permanent partial disability for 104 weeks from September 16, 1985, at the rate of $96.19 per week. A credit shall be taken for payments previously made and interest shall be paid on any net amounts due for said periods, payable at the rate(s) prescribed by 28 U.S.C. §1961 (1982) and computed from the date each payment was due.

2. Upon the expiration of 104 weeks from September 16, 1985, the permanent partial disability compensation and interest referred to in paragraph 1 shall be paid to claimant by the Special Fund, which shall also reimburse the employer/carrier, with appropriate interest, for any payments made to claimant after the expiration of 104 weeks.

3. The employer/carrier shall also pay to claimant the sum of $279.50 in reasonable, unreimbursed travel expenses incurred in obtaining medical care for the treatment of his January 1985 left shoulder injury.

APPENDIX E

APPENDIX E

CHARLES S. SPROULL, Claimant,

v.

STEVEDORING SERVICES OF AMERICA,

Employer, and

EAGLE PACIFIC INSURANCE COMPANY,

Insurance Carrier.

Case No. 14-82112

U.S. Department of Labor
Office of Workers' Compensation Programs

Filed February 8, 1990

COMPENSATION ORDER -
DENIAL OF ASSESSMENT OF 20 PERCENT
PENALTY SECTION 14(F) ON INTEREST

On March 13, 1989, an Administrative Law Judge Decision and Order was filed in The Office of the Deputy Commissioner awarding benefits. Said order is made part herein by reference.

FINDINGS OF FACT

1. Compensation due per the order was timely paid by the employer/carrier.

2. That interest on compensation due per the order was not paid within 10 days of the date order was filed; that interest was paid on June 23, 1989.

3. That the claimant has requested that a supplementary order be issued finding that he is entitled to 20% penalty under Section 14(f) for interest not paid within 10 days.

4. That the employer/carrier has objected to the 20% penalty on the ground that interest is not compensation for purpose of penalty.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following:

DETERMINATION

That late payment of interest on compensation due per compensation order is not subject to the 20% penalty provided in Section 14(f) for late payment of compensation.

That the Deputy Commissioner is without authority and declines to issue the order so requested by the claimant.

Given under my hand at Seattle, Washington this 8th day of February, 1990.

s/ Karen P. Goodwin
Deputy Commissioner
14th Compensation District

APPENDIX F

APPENDIX F

CHARLES SPROULL, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; STEVEDORING SERVICES OF AMERICA; EAGLE PACIFIC INSURANCE COMPANY, Respondents.

No. 94-70906

STEVEDORING SERVICES OF AMERICA; EAGLE PACIFIC INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; CHARLES SPROULL, Respondents.

No. 94-70914

United States Court of Appeals, Ninth Circuit

Filed August 30, 1996

Before: Goodwin, Skopil, and Schroeder, Circuit Judges

ORDER

The panel has voted to deny the petition for rehearing of Stevedoring Services of America and Eagle Pacific Insurance Company. Accordingly, the petition for rehearing is DENIED.

APPENDIX G

APPENDIX G

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT - EXCERPTS

33 USC § 902(12) -- "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

33 USC § 908(h) -- The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 USC § 910 -- Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

. . . . . .

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 USC § 914(f) -- If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.